IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

BISONBORD LIMITED Appellant

and

K BRAUN WOODWORKING MACHINERY (PROPRIETARY) LIMITED Respondent

CORAM: HOEXTER, BOTHA, MILNE, JJA et NICHOLAS, GOLDSTONE, AJJA

HEARD: 9 March 1990

DELIVERED: 10 September 1990

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

This appeal raises the question of the competence of a court to hear and determine an action sounding in money instituted against a company solely on the grounds that it was incorporated in South Africa and has its registered office within the area of jurisdiction of such court. In the Witwatersrand Local Division the appellant instituted an action for the payment of damages against two defendants. The first defendant in the action is the respondent in the appeal.

Chapter VII of Act 61 of 1973 ("the Companies Act") requires every company to have a postal address and a registered office within the Republic of South Africa. Subsections (1) and (2)(a) of sec 170 read as follows:-

> "170 (1) Every company including every external company shall have in the Republic -
>
> (a) a postal address to which all communications and notices may be addressed; and
>
> (b) a registered office to which

all communications and notices may be addressed and at which all process may be served.

(2) (a) Upon incorporation of a company, notice of the situation of the registered office and of the postal address shall be given to the Registrar."

Apart from pleading to the merits of the case the respondent filed a special plea in which it raised an objection to the jurisdiction of the Witwatersrand Local Division to hear the action. Although its registered office is situated in Johannesburg the respondent carries on its business at Butterworth in the Republic of Transkei. The respondent's objection to the jurisdiction of the Court **a quo** was based upon the fact that its sole place of business is in the Transkei.

In the Court below the special plea was resisted on a number of different grounds. The chief contention advanced on behalf of the appellant was that,

inasmuch as the respondent had its registered office in Johannesburg, it was, within the meaning of sec 19(1)(a) of the Supreme Court Act, No 59 of 1959 ("the SC Act") -

".....a person residing or being in"

the area of jurisdiction of the Witwatersrand Local Division. The matter came before J F MYBURGH, AJ. The learned Judge ruled that the respondent was not "a person residing or being in" the area of jurisdiction; and he rejected the further submissions raised on behalf of the appellant in support of its argument that the trial Court was empowered to entertain the action. The special plea was accordingly upheld, and absolution from the instance, with costs, was ordered.

With leave of the trial Court the appellant appeals to this Court. The sole issue raised in the appeal is the correctness or otherwise of the decision by MYBURGH, AJ that the respondent was not "a person residing

or being in" the area of jurisdiction of the Witwatersrand Local Division.

The respondent is not a natural person but a corporation. As pointed out by Martin Wolff, **Private International Law** 2nd ed (1950) at 295:-

> "....it is useful to realize that conceptions used in the case of natural persons, such as nationality, domicile, or residence, can be applied to legal persons only by way of analogy and not without distortion of their original and genuine meaning. Yet it seems impossible to do without these conceptions. For every legal system contains some rules which attach certain consequences to a person's nationality, domicile, or residence without distinguishing between natural and artificial persons."

A judgment sounding in money may be put into effect anywhere. From this it follows (see Pollak, **The South African Law of Jurisdiction** (1937) at 22) that in an action for the payment of money -

> "...it is a sufficient basis for jurisdiction that the state in whose court the action is brought has power over the defendant."

Dealing with the State's supreme power and the jurisdiction of its courts BRISTOWE, J remarked 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."

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 SC 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.

In regard to the jurisdiction of South African courts over domestic corporations Pollak, op cit, 94 states:-

> "A corporation incorporated in the Union is subject to the power of the South African state and it follows therefore that on principle South African courts should have jurisdiction in an action for a judgment sounding in money against it. But owing to the non-existence of any court having authority in respect of the whole Union and owing to the territorial limitations imposed upon the authority of the divisions of the Supreme Court, this principle cannot by itself furnish a criterion of jurisdiction in an action against a domestic corporation. The courts have therefore been unable to rely solely on this principle for the purpose of determining their jurisdiction in actions against domestic corporations and have been compelled to supplement this principle by another criterion of jurisdiction. This they have found in the notion of the principal place of business of a corporation."

The notion to which Pollak makes reference in the

concluding sentence of the passage cited above was discussed in an early judgment of this Court in **T W Beckett & Co Ltd v H Kroomer Ltd** 1912 AD 324. In **Beckett's** case the defendant was a company which had its registered office and its principal place of business in Pretoria. It also had a branch in Johannesburg. The plaintiff sued the defendant in the Witwatersrand Local Division for damages for alleged breach of contract. Before the trial Court an objection was unsuccessfully raised to the jurisdiction of the Witwatersrand Local Division, but on appeal this Court held that the objection had been properly taken. The judgment of this Court was delivered by INNES, J. The jurisdiction of the trial Court was derived from sec 16 of the Transvaal Administration of Justice Proclamation 14 of 1902 according to which enactment (I quote from the judgment of INNES, J at 331-332) the Local Division:-

> "....shall have cognizance of all pleas and jurisdiction in all civil causes and proceedings

> arising ..... within the said Colony, with jurisdiction over His Majesty's subjects and all other persons whomsoever residing or being within the said Colony."

This Court held that the residence of the appellant was at Pretoria, where its general administration was centred; and that it could not be deemed to have a residence in Johannesburg for the service of process in respect of a contract entered into with its Pretoria office. In the course of his judgment the learned Judge of Appeal observed at 334:-

> "Now, the terms 'reside' and 'residence' can only be used in their true significance with regard to natural persons. The residence of a legal **persona**, like a company, artificially created, must be a mere notional conception introduced for purposes of jurisdiction and law .... The only home which a corporation can be said to have is the place where the operations for which it was called into existence are carried on. So far as it can be said to reside anywhere, that is where it resides. And if the analogy of a natural person is to be followed, one would say that it could only reside in one place at one time. This is a point on which from the nature of things it is not possible to obtain Roman-Dutch

authority; but there is ample support in English law - both text books and cases - for that view in regard to the domestic aspect of the residence of companies."

Sec 19 of the SC Act deals with the persons over whom and the matters in relation to which provincial and local divisions of the Supreme Court have jurisdiction. Relevant to a consideration of the present appeal are the introductory words of subsection 19(1)(a) and subsection 19(3) which read as follows:-

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

(b) .....

(2) .....

(3) The provisions of this section shall not be construed as in any way limiting the powers of a provincial or local division as existing at the

> commencement of this Act, or as depriving any such division of any jurisdiction which could lawfully be exercised by it at such commencement."

The words "causes arising" used in sec 19(1) of the SC Act are - in various juxtapositions - to be found in all the statutes establishing the colonial predecessors of the various provincial and local divisions in South Africa (eg sec 30 of the Charter of Justice 1834; sec 6 of the Supreme Court Act (Natal) 39 of 1896; sec 16 of the Administration of Justice Proclamation (Transvaal) read with sec 3 of the Establishment of the Supreme Court and High Court Ordinance (Transvaal) 2 of 1902; sec 3 of the Administration of Justice Ordinance (ORC) 4 of 1902.) See Pollak, **op cit**, 7 - 8. In a long line of cases the words "causes arising" have been interpreted 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. **In Steytler NO v**

Fitzgerald 1911 AD 295 INNES, J (at 315) said of the phrase "all causes arising":-

> "There the word 'causes' clearly means legal proceedings..... 'Arising' of course means duly arising. And an action arises where it has its origin, where the first steps to begin it can be duly taken. So that when a Court is given unlimited jurisdiction in all 'causes arising' within a certain area, that is equivalent to giving it jurisdiction to try all matters for which by the Common Law of the country the highest Court of first instance would in that area be the proper forum."

In the same case LAURENCE, J put the matter thus (at 331):

> "When does a cause 'arise in the said districts'? It appears to me that it can only so arise when the party, the defendant, or the accused, is amenable to the forum created by the Act. In civil matters he is so amenable if he resides there, wherever the cause of action arose, on the principle **actor sequitur forum rei.**"

See further: **The Owners, Master and Crew of the SS "Humber" v The Owners and Master of the SS "Answald"** 1912 AD 546 at 553 - 4; **Lek v Estate Agents Board** 1978(3) SA 160(C) at 166H-167C; **Softex Mattress (Pty) Ltd v Transvaal Mattress**

and Furnishing Co Ltd 1979(1) SA 755(D) at 757 B-D. In **Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk** 1963(2) SA 10(T) TROLLIP, J summarised the position (at 17 F-H) as follows:-

> "The result is that the Court's jurisdiction under s 19(1) is simply determined, as hitherto, by reference to the common law and/or any relevant statute. In such determination the presence or residence of the defendant or respondent within or without the Court's area of jurisdiction will have that importance or relevance which the common or statute law attaches to it (Pollak pp 9 - 14 where all the authorities are collected.) See too s 19(3) by virtue of which the jurisdiction which any Division had by common law and/or statute law at the commencement of the Supreme Court Act is retained."

In regard to the connecting factors or **rationes jurisdictionis** recognised by our common law, a convenient starting point is the classic statement of DE VILLIERS, CJ in **Einwald v The German West African Company** (1887) 5 SC 86 at 91 -

> "What then are the grounds upon which the

> jurisdiction of this Court can be exercised, in respect of any contract over any defendant without his consent, express or implied? The grounds are threefold; viz. **by virtue of the defendant's domicile being here**, by virtue of the contract either having been entered into here or having to be performed here, and by virtue of the subject matter in an action **in rem** being situated in this Colony." (Emphasis supplied.)

It is no less clear, however, that at common law residence of the defendant entrenches the jurisdiction of the relevant forum. In **Sciacero & Co v Central South African Railways** 1910 TS 119, the judgment of INNES, CJ begins (at 121) with the following words:-

> "The general rule with regard to the bringing of actions is **actor sequitur forum rei.** The plaintiff ascertains where the defendant resides, goes to his forum, and serves him with the summons there."

The concept underlying jurisdiction based upon domicile and residence of a defendant who is a natural person in an action for a judgment sounding in money is described as follows by Pollak, **loc cit**, at 24 - 25:-

> "If the defendant, although not physically present within the state, is domiciled therein, a judgment against him sounding in money can usually be made effective against him. If a person is domiciled in a state he usually has his home there. Such a person can therefore be expected to return to the state and to have the bulk of his possessions within the state. A judgment sounding in money can therefore normally be made effective against a person who is domiciled within the state. It is true that a person may be domiciled in a state without having his home there, and in such a case it may be unlikely that a judgment sounding in money can be made effective against him in such state. This, however, is an unusual case; normally a person is domiciled in the state which is in fact his home. It is therefore not unreasonable to disregard the unusual case and to say that the domicile of the defendant within the state is a sufficient basis for jurisdiction in an action in which a judgment sounding in money is claimed.
>
> What has been said in favour of domicile as a basis for jurisdiction applies equally to residence. If the defendant is resident within the state, then, although he is not physically present within the state at the time of the commencement of the action, a judgment sounding in money will normally be effective againt him."

I shall return to the subject of domicile - and then more specifically in relation to corporations - later in this

judgment after deciding whether the Court **a quo** was correct in ruling that the respondent was not resident within its area of jurisdiction. But it may be as well to say at this juncture that in the case of **Minister of the Interior v Cowley NO** 1955(1) 307(N) BROOME, JP, in my respectful opinion, erred (at 311 G-H) when he stated that he was -

> "....not prepared to accept the broad rule that a Court will always have jurisdiction in a claim sounding in money against a defendant who is domiciled within its area of jurisdiction."

I further agree with the view expressed by Pollak, **loc cit,** at 41, note 1, that no justification exists for the doubt expressed by MASON, JP in **Foord v Foord** 1924 WLD 81, as to whether domicile without residence or physical presence is a sufficient ground for jurisdiction in an action in which a judgment sounding in money is claimed. At 41 Pollak cites in this connection the authority of Noodt, **Commentaries on the Pandects,** 5.1; and Vromans **Tractaat de Foro Competenti** (1.IV.4) who states:-

> "En is sodanigen Persoon convenibel voor dien Rechter, onder wien Jurisdictie hy sijn domicilium gekoren heeft, het zy dat hy al-daar gevonden werd personelijk, ofte niet."

In my view the legal position is correctly summarised thus by Forsyth, **Private International Law**, 2nd ed (1990) at 175 -176:-

> "Provided that the defendant is an **incola** of the court's area of jurisdiction, the court will be prepared to hear the case ..... Accordingly, if the defendant is either domiciled or resident in the area, this will be a sufficient jurisdictional connecting factor. Neither of these requirements predicates the actual physical presence of the defendant within the court's area. If the defendant is present, he may be brought to court by summons in the ordinary manner; if he is absent, then, subject to the Rules of Court, summons may be effected by edictal citation or substituted service, as the case may be. Domicile and residence suggest no more than a notional connection with the court's area. Absence is relevant only in regard to the procedural matter of service."

In the instant matter MYBURGH, AJ, in upholding the respondent's objection to the competence of the trial Court, declined to follow an earlier judgment in **Dairy**

Board v John T Rennie & Co (Pty) Ltd 1976(3) SA 768(W), in which ELOFF, J had decided that in law a South African domestic company resides at the place of its registered office. Henochsberg **on the Companies Act**, 4th ed (1985), vol 1, at 256, submits that in the **Dairy Board** case (supra) the Court reached a wrong conclusion; and that for purposes of common law jurisdiction a domestic company resides at its principal place of business (i e its administrative centre).

In the **Dairy Board** case meetings of the defendant company's board of directors were held chiefly in Durban where most of its directors lived. The business of the defendant was controlled from Durban. However, the defendant had its registered office in Johannesburg, and the plaintiff instituted its action (for enforcement of an undertaking made by the defendant in terms of sec 309(1)(a) of the Merchant Shipping Act, 57 of 1951) in the

Witwatersrand Local Division. Inasmuch as the cause of action had not arisen in the Witwatersrand Local Division the trial Court was competent to hear the action only if in law the defendant "resided" within its jurisdiction.

In the course of his judgment ELOFF, J remarked at 769 G-H:-

> "As to the significance of the fact of the situation of the registered office of a company, Pollak, **The Law of Jurisdiction**, pp 94 - 95, states:-
>
> > 'In the normal case the registered office and the principal place of a company are one and the same place. They may, however, be different, and in such case the situation of the principal place of business and not that of the registered office, is the relevant factor for the purposes of jurisdiction in an action for a judgment sounding in money against the company.'
>
> No authority is quoted for this proposition, however, and there is, as far as I have been able to ascertain, no decided case in which it was laid down that the place given as the registered address of a company incorporated in South Africa

> is not the place where the company resides or is."

ELOFF, J distinguished **Beckett's** case (**supra**), in which, so observed the learned Judge (at 770 F-G):-

> ".....the Court did not have to consider the question whether a company might not be said to reside or be where its registered address is; it had merely to deal with the question whether a corporation with a firmly established residence in the sense described in the above-quoted passage" (i e where its general administration is centred) "could acquire a second residence by reason of having a further place of business elsewhere. The problem with which I am presently concerned is unusual for the reason, as is pointed out by **Pollak, supra,** that it is reasonable to suppose that a company will normally select as its registered head office its principal place of business. And I do not think that is the sort of situation to which the learned Judge of Appeal addressed his mind when expressing himself as he did."

Later in his judgment ELOFF, J (at 771 B-D) cited provisions of the Companies Act which prescribes that the registered office is the place at which all process against a company may be served; and where are kept such

official documents and records appertaining to the company as the minute book of its general meetings; the register of allotment of shares; the register of members and directors and officers; the register of attendance of meetings of directors and managers; the register of fixed assets, and so forth. Such provisions led ELOFF, J to draw the inference (at 771 D-E) that the legislature had intended to endow the registered office with the quality of being the place to which the world might look as the company's legal home and administrative centre. In the opinion of the learned Judge this view of the matter was reinforced by considerations of commercial convenience and expediency. At 771 E - H he remarked:-

> ".....to view the registered office as the residence of a company is to create certainty and to bring about commercial convenience ..... To hold that the registered office is the place of residence for purpose of jurisdiction is to remove all doubt as to the Court in which a person intending to sue a company conducting business at various places may do so. In this

regard it is not inappropriate to remark that in these days companies sometimes conduct their affairs so that it may be difficult to determine where its 'general administration is centred'. And although it may in fact have been true in 1912 that a company and a person had only one residence, one finds it said in Palmer's **Company Law**, 21st ed., p 66, that:

> 'Moreover, a company - like an individual - may have several residences at the same time.'

In my view, a company registered in South Africa resides in law where the registered office is. If its principal place of business is situated elsewhere it may **also** reside at the latter place. I accordingly hold that this Court has jurisdiction in the present matter."

Against the background sketched above it is necessary now to look more closely at the reasons which prompted the Court **a quo** to uphold the respondent's objection to the jurisdiction of the Witwatersrand Local Division. In his judgment MYBURGH, AJ relied upon the **dictum** of INNES, J in **Beckett's** case which has already been quoted by me; and which was discussed by ELOFF, J in the **Dairy Board** case

supra. **Beckett's** case is not, I consider, germane to the issue in the present appeal. The ultimate conclusion at which this Court arrived in **Beckett's** case was a limited one. INNES, J rounded off his judgment (at 339) with the following succinct remarks:-

> "For the purpose of this case it is not necessary to say more than that a Company should not be compelled to accept service anywhere, save at its central office, of process the object of which is to enforce or recover damages in respect of a contract entered into with the officials of its central administration."

MYBURGH, AJ further considered that he was bound by the Transvaal Full Bench decision in **Grimshaw v Mica Mines, Ltd** 1912 TPD 450. It seems to me, with respect, that having regard to the only issue which there arose the judgment in that case is not helpful in resolving the problem which confronted the learned Judge in the instant matter. In the **Grimshaw** case the defendant was a foreign

company directed and controlled in England. It owned base metal claims in the Zoutpansberg which had been managed by the plaintiff. The plaintiff sued the defendant for arrear wages in the court of the civil magistrate at Johannesburg. As a foreign company the defendant had complied with sec 198 of Act 31 of 1909 by filing with the Transvaal Registrar of Companies the name of a person authorised to accept service of process locally on behalf of the defendant; and the summons was served at such person's registered address in Johannesburg. The only point in the case was whether or not the defendant was a person "residing or carrying on business" in Johannesburg within the meaning of the Magistrates' Courts Proclamation 21 of 1902. The magistrate decided that the defendant neither resided nor carried on business at Johannesburg at the time of the issue of summons and he dismissed the summons. The Full Bench considered that the magistrate's

decision was right and it dismissed the appeal to it.

Apart from the fact that he felt himself bound by the **Grimshaw** case **(supra)** MYBURGH, AJ was further minded to rule in favour of the respondent by invoking against the appellant the principle of effectiveness. In this connection the learned Judge remarked:-

> "It seems to me to be more in keeping with that principle that section 19(1)(a) of the Act should be interpreted to mean that, in the case of a company, its residence is where it carries on its main business and not where its registered office is, when its registered office is not at its principal place of business."

This last rumination does not, with respect, commend itself to me. If there should be found to be present in the instant case any of the recognised connecting factors sufficient to found jurisdiction, then, so it seems to me, the position of the respondent is such that the doctrine of effectiveness will not militate against an actual exercise of the Court's jurisdiction. Indeed, as I shall

try to show later in this judgment, the matter stands very differently.

The arguments addressed to us may be shortly stated. Adopting the criticism levelled by Henochsberg, **op cit**, Mr **Blieden** for the respondent urged upon us that the judgment in the **Dairy Board** case (**supra**) confused the concept of a mere place at which process and notices might be served upon a company with the very different concept of jurisdiction as contemplated by sec 19 of the SC Act; and that the Court a **quo** had correctly declined to follow the judgment of ELOFF, J in that case. A submission set forth in his written heads of argument which sought to rely on the doctrine of effectiveness was abandoned by Mr **Blieden**, wisely I think, in the course of his argument before us. Mr **Shaw**, who appeared for the appellant, submitted that there was much to be said for the general approach adopted by ELOFF, J in the **Dairy Board** case; and he contended that

in that case the objection by the defendant to the jurisdiction of the Witwatersrand Local Division had been properly dismissed. However, calling to mind the intricate webwork of the English legal principles governing the subject, Mr Shaw owned to being wary of the concept of "residence" in relation to South African domestic companies. Shying away from the word "residing" in sec 19(1) of the SC Act, he preferred to lay stress on the words "or being in". A meaning other (and a requirement more flexible) than "residence" should be assigned to the words "being in". Counsel suggested that while the phrase "being in" signified some sort of "presence", it was nevertheless a presence less habitual and more ephemeral than that comprehended by the word "residence". This less rigorous requirement, so it was said, was amply satisfied by the location of a domestic company's registered office within a particular area. On

this narrow ground counsel for the appellant invited us to differ from the conclusion at which the Court **a quo** arrived. For reasons which follow I am unable to accede to this argument.

In **Schlimmer v Executrix in Estate of Rising** (**supra**) the defendant lived in Pretoria. Se had, however, the monthly tenancy of a house in Fordsburg. This house she sub-let, save for a single room which she reserved for her own use. On an average she visited Johannesburg once a week to consult her legal advisers, and occasionally she slept in the room. The jurisdiction of the Witwatersrand High Court depended (as did the jurisdiction of the Witwatersrand Local Division in **Beckett's** case (**supra**)) on the provisions of the Transvaal Administration of Justice Proclamation, 1902. The plaintiff sued the defendant in the Witwatersrand High Court and the latter's power to hear the action depended on

whether or not the defendant was a person "residing or being within" the Court's area. Alleging that she resided in Pretoria the defendant objected to the Court's jurisdiction. The objection was sustained. Having quoted the relevant provisions of the 1902 Proclamation BRISTOWE, J said the following (at 110):-

> "It was contended that these sections taken together give this Court jurisdiction over all persons 'residing or being' within its district, and the argument turned mainly on whether having a room within the jurisdiction constituted 'being' within it. On consideration I doubt whether this argument is sound. Sec 16 gives the Supreme Court in the first place, 'cognisance of all pleas' which I take to mean pleas of the Crown. It is from this that it derives its criminal jurisdiction. Next it gives the Court jurisdiction in all civil causes arising within the colony. From this it derives its civil jurisdiction. Thirdly, it gives it jurisdiction over all persons residing or being within the colony. This I read as merely supplementing the criminal and civil jurisdiction already given, by conferring on the Court such powers over people in the colony as are necessary to enable it to give effect to its sentences, judgments, and orders.

> If this is the true view, then the jurisdiction of the Supreme Court in a civil proceeding depends on whether it is a cause or proceeding 'arising' in the colony, and not on whether the defendant is 'residing or being' within the colony; and by parity of reasoning the jurisdiction of the High Court in a civil proceeding depends on whether it is a cause or proceeding arising within the district of the High Court, not on whether the defendant is 'residing or being' within such district. The broad result of this is that nothing turns on the words 'or being'".

In the passage just quoted it seems to me, with respect, that by saying that the Court's jurisdiction did not depend on whether the defendant was "residing or being within" the Court's district, the learned Judge clearly did not intend to convey that the fact of residence was irrelevant to the inquiry. That he could have entertained no such intention is made quite plain, for example, by the following passage later (at 112) in his judgment:

> "The question which I have to decide is therefore simply whether she resides within or is an

> inhabitant of the district covered by the jurisdiction of the High Court, or whether she is a mere **peregrinus.**"

It seems to me that what Mr Justice Bristowe here had in mind was simply the principle (more explicitly enunciated by this Court in 1911 in **Steytler NO v Fitzgerald (supra)**) that one situation in which a "cause arises" is where the defendant resides within the Court's area and is thus amenable to such forum.

The reasoning of BRISTOWE, J was applied in **Bank of Africa v Cohen** 1908 TH 52, a case which is most pertinent to the point now being discussed. There the plaintiff sued the defendant in Johannesburg for provisional sentence on a promissory note which had been made in Kimberley. The defendant was a resident of Kimberley who had come to Johannesburg on a visit. It was argued for the plaintiff that the Court had jurisdiction to hear the case, because of the words "or being" in sec 16 of

the Proclamation. The argument was rejected by CURLEWIS, J, who said that the words of sec 16 had come under consideration in **Schlimmer's** case **(supra)**, and that he accepted the interpretation there placed upon them by BRISTOWE, J. (Cf. also the remarks of GREENBERG, J in **Van Zyl v Van Zyl** 1928 WLD 195 at 196/7 and 199.)

With the advent of Union the legal position stated above remained unchanged in relation to the various divisions of the Supreme Court which took the place of the colonial Supreme Courts. Nor did the Administration of Justice Act 27 of 1912 bring about any change in the position. Its provisions and their effect were summarised by TROLLIP, JA in **Estate Agents Board v Lek** 1979(3) SA 1048(A) at 1061 B-H. It is unnecessary to repeat what was said there.

I respectfully agree with the view expressed by BRISTOWE, J in **Schlimmer's** case **(supra)** that in the 1902

Transvaal Proclamation nothing turned on the words "being within". They merely affirm but do not enlarge the jurisdiction endowed by "causes arising". The same applies to the words "being in" in sec 19(1) of the SC Act. A similar view of the matter is expressed by Forsyth, **op cit.** Dealing with the residence of natural persons for jurisdictional purposes the learned author states (at 164-165):-

> "In s 19(1)(a) of the Supreme Court Act, it is provided that the various divisions of the Supreme Court shall have jurisdiction over 'all persons residing or being in' their areas of jurisdiction; but the term 'residing' is not defined in the Act. Instead it must be defined in terms of the common law. As we have seen, s 19(1)(a) has been interpreted to mean little more than that the divisions of the court are limited to their territorial jurisdiction according to the principles to be found in the common law. In particular, the courts have refused to equate 'residing' in s 19 with 'being', i e they have not considered their jurisdiction to be dependent **either** on mere physical presence **or** on residence. A strict distinction is always drawn between these two concepts."

If, then, a particular division of our Supreme Court is not endowed with jurisdiction over a natural person who is an incola of the Republic but a peregrinus within its area of jurisdiction, solely because of such person's presence ("being") within that area at the time of service of a summons upon him, does not the same principle apply in the case of a company? If the customary artificial analogy between natural and juristic persons, which is to be found in the cases on the topic of jurisdiction, is applied, the answer must be yes.

Since "residence" is a concept based on the habits of a natural man the notion of a company's "residence", as has already been pointed out, is necessarily a somewhat abstruse and nebulous one. Insofar as the law requires the concept to be assigned to a corporation, however, it seems to me that the idea of the registered office of a domestic South African company as

its "home" represents a juristic abstraction which is by no means unsound in principle. In England the decisions in **Cesena Sulphur Company Ltd v Nicholson** (1876) 1 Ex Div 428 and **Calcutta Jute Mills, Ltd v Nicholson** (1876) 1 Ex Div 437 marked the beginning of the elaboration of a different doctrine in England. The company concerned in each case was a joint stock company incorporated in England. In both cases the ***ratio decidendi*** was that the test of a company's residence for purposes of Income Tax was that of control; a test later established beyond doubt by the House of Lords in the case of **De Beers Consolidated Mines, Ltd v Howe** (1906) AC 455. In **Egyptian Delta Land and Investment Co., Ltd v Todd** (1929) AC 1 the Income Tax Commissioners held that an investment company registered in England, but controlled from abroad, was not resident in England. In an unanimous judgment the Court of Appeal held that a company regulated by the 1908 Companies Act had

a residence (though not necessarily a sole residence) at its registered office. With reference to the many statutory requirements imposed on a company by the Companies (Consolidation) Act (1908) LORD HANWORTH, MR remarked (see (1928) 1 KB at 167/ 168):-

> "If the matter is to be determined by analogy I should affirm that a man with a local habitation and compelled to do certain acts in accordance with local laws ..... could not prevent the inference being drawn that he 'kept home' in that locality."

However, in the House of Lords it was unanimously held that incorporation in England and a registered office in that country did not, without more and as a legal consequence, make a company resident in England for Income Tax purposes. (An illuminating discussion of the topic of the residence of a corporation in English law together with a close analysis of the case law is to be found in Farnsworth, **The Residence and Domicil of Corporations (1939)).**

The particular evolution in England of legal

rules governing the determination of a company's residence notwithstanding, it is worthy of note, I consider, that there have been various judicial pronouncements in the English courts to the effect that when the problem is viewed purely as one of principle, untrammelled by judicial precedent and legislative enactment, the notion that the residence of a company is its registered office has much to commend itself. One such example is provided by the **dictum** already quoted from the judgment of the Master of the Rolls when the **Egyptian Delta** case **(supra)** was before the Court of Appeal. Two further illustrations may usefully be taken from the speeches read in the House of Lords when the latter upset the judgment of the Court of Appeal. In the course of his judgment LORD BUCKMASTER said (at 35):-

> "The difficulty ..... is due to the fact that residence is essentially a condition applicable to men, and the tests for its determination, such as living and sleeping, can have no proper

> counterpart in an abstract entity such as an incorporated company which can neither live nor sleep. It must, however, be assumed that a company has a residence, and if the question is looked at entirely apart from authority, I should have thought that the place of the registered office was also the place where the abstraction known as 'a company' resided."

At 40 LORD WARRINGTON OF CLYFFE expressed himself as follows:-

> "Independently of authority, and in the absence of any relevant provisions of the Income Tax Act, 1918, throwing light on the meaning attributed by the Legislature to the words 'residing' and 'resident', as used in the Act, I should probably have been of the opinion that the provisions of the Companies Act to which I have referred lead to the conclusion that, whatever other residence the company may have the Legislature has provided that the registered office shall be a residence.
> .....-
> .....
>
> The cumulative effect of these provisions apparently creates for the company a statutory home where it is to perform the corporate functions abovementioned, and where it is regarded as at all times present and ready to receive such documents and communications as are left or sent there."

The broad line of reasoning pursued by ELOFF, J in the **Dairy Board** case (**supra**) which led him to conclude that in South Africa a domestic company in law resides at the place of its registered office has already been examined. It should be added, however, that in discussing the statutory obligation of a South African company to accept service of process at its registered office the learned Judge regarded as significant and he sought to rely upon the fact that in English law service of a writ represents the technical foundation of jurisdiction. In this connection (at 770 **in fin** - 771) ELOFF, J remarked:-

> "This correlation between the address at which service may be effected and jurisdiction over a corporation is, I think, in accordance with what was said by Cheshire, **Private International Law** 7th ed., p 174, as follows:
>
> > 'If he is found here he can be served here and at common law the exercise of jurisdiction depends upon service. It is the same in the case of a corporation'".

The soundness of this line of argument has been questioned, albeit with his customary scholarly diffidence, by Professor Ellison Kahn. In **The Annual Survey of SA Law** (1976) he writes (at 524):-

> "With respect, one wonders how persuasive this rule is : jurisdiction in actions **in personam** based on service of the writ, so basic to English law, is *not known* to our law. As for the general attitude of English law to the residence of a corporation, it appears to vary with the issue involved. In the English law of taxation, where it is a vital concept, the residence is at the centre of the management and control of the corporation's affairs, with the proviso that if control is virtually equally divided between two centres, the company has two residences, one at each centre (**Dicey & Morris on the Conflict of Laws** 9 ed (1973) 703 - 5, **Cheshire's Private International Law** 8 ed (1970) 186 -190, J H C Morris **The Conflict of Laws** (1971) 32, R H Graveson **Conflict of Laws** 7 ed (1974) 224). But in the English law relating to jurisdiction in actions **in personam** - and only for that purpose - the residence of a company is deemed to be where it has its registered office (**Dicey & Morris** 177)."

(For the sake of completeness it may be mentioned that in England the current position appears to be that a company

registered under the 1985 Companies Act is regarded as present in England and service of a writ may be effected by sending it to the registered office of the company. See: Cheshire & North's **Private International Law** 11th ed (1987) 188.)

In my respectful view the criticism of Prof Kahn quoted above is well-founded. Making due allowance for it, however, I nevertheless find attractive the remainder of the reasoning of ELOFF, J and the conclusion to which he was impelled, namely, that for purposes of deciding in an action for a judgment sounding in money whether a particular division of the Supreme Court of South Africa has power to entertain legal proceedings against it, a domestic South African company "resides" where its registered office is.

In the **Dairy Board** case ELOFF, J expressed the further opinion that if such a company's principal place of

business is situated elsewhere than at its registered office, then the company might in law also "reside" at the latter place. On this point too, and for the reasons hereunder, I agree with ELOFF, J.

It is true that in **Beckett's** case (**supra**) at 334 INNES, J said in relation to a corporation that:-

> ".....if the analogy of a natural person is to be followed, one would say that it could only reside in one place at one time."

It seems to me, with great respect, that the soundness of the above-quoted proposition is open to question. In **Ex Parte Minister of Native Affairs** 1941 AD 53 this Court was called upon to give a ruling as to the meaning of the words "resides" in the proviso to sec 10(3) of the Black Administration Act 38 of 1927. In delivering the judgment

of the Court CENTLIVRES, JA remarked at 58/59:-

> ".....it is clear on the authorities that a person can have more than one residence and should in that case be sued before the magistrate of the place where he resides at the time when the summons is issued."

For certain purposes English law recognises the possibility of dual residence in the case of companies. In **Swedish Central Railway Co Ltd v Thompson** 1925 A C 495 (HL) it was held that for income tax purposes a registered company could have more than one residence. The majority in the House of Lords concurred in the opinion of LORD CAVE LC. Commenting upon the earlier decision in the case of **De Beers Consolidated Mines, Ltd v Howe (supra)**, LORD CAVE said at p 501:-

> "The effect of this decision is that when the central control and management abides in a particular place, the company ..... has a residence at that place; but it does not follow that it cannot have a residence elsewhere. An individual can clearly have more than one residence..... and in principle there appears to be no reason why a company should not be in the

same position."

I have had the advantage of reading the judgment prepared in this appeal by my Brother NICHOLAS. NICHOLAS, AJA takes the view that the conclusion of ELOFF, J that a company "resides" where its registered office is, is contrary to principle and authority. I am unable, with respect, to share that view.

NICHOLAS, AJA bases his view particularly on three cases: **Estate Kootcher v CIR** 1941 AD 256, **Beckett's** case **(supra)**, and the **Grimshaw** case **(supra)**. I shall presently consider each of these cases individually, but it is convenient to acknowledge, in general terms, that it was held in each of them that a company resides at the place where its general administration is located, i e at the seat of its central management and control, from where the general superintendence of its affairs takes place, and where, consequently, it is said that it carries on its real

or principal business. For the sake of brevity I shall refer to this as the company's "place of central control". That a company resides at its place of central control was again accepted in **Vanderbijl Park Health Committee and Others v Wilson and Others** 1950 (1) SA 447 (A) at 466-7. The principle is accordingly well established in our law, and I can see no warrant for departing from it. I accept, furthermore, that it applies in respect of matters of jurisdiction, with the result that the court of the area where the company's place of central control is situated will have jurisdiction to entertain a monetary claim against the company, on the ground that it is resident within the court's area of jurisdiction. On this approach it follows that, if the company's registered office is located elsewhere than at its place of central control, a finding that the company is resident at the place of its registered office for the purposes of jurisdiction must

necessarily involve an acceptance of the principle that a company can for such purposes (i e in regard to questions of jurisdiction) be resident at two places at the same time. In my judgment, the cases that I have mentioned do not preclude the acceptance of such a principle, as I shall endeavour to show in a moment, and I consider that this Court should now approve it. Accordingly I find that a company can and does have a dual residence for jurisdictional purposes, where its central control and its registered office are located at different places.

In the case of **Estate Kootcher (supra)** the Court was not concerned with any question relating to jurisdiction and its judgment did not touch at all on the question now being discussed. This is pertinently demonstrated by the decision in **Appleby (Pty) Ltd v Dundas Ltd** 1948 (2) SA 905 (E). In that case a foreign company, registered in England and with its head office in England,

had a branch office in Johannesburg, where it carried on business. It was sued in the EDL on contracts entered into within that Court's area of jurisdiction. The issue for decision was whether the company resided in the Union within the meaning of that phrase in section 5 of the 1912 Act. It was held that it did. HOEXTER, J said (at 911-2):

> "Counsel for the defendant relied very strongly on the case of **Estate Kootcher v Commissioner for Inland Revenue** (1941 AD 256), in which the Appellate Division held that the Standard Bank of S A Ltd is not, for the purposes of section 4(a)(ii) of the Death Duties Act, No 29 of 1922, a person ordinarily resident in the Union. It was held that the Standard Bank of S A Ltd resides in England, where it is registered and where its central management and control actually abide, and that it could not acquire a residence in the Union by having branches and carrying on business here.
>
> That case, however, dealt with death duties and was not intended to govern the interpretation of the word 'reside' when it occurs in a statute concerning jurisdiction. That it was not so intended may be inferred from the following passage in the judgment of WATERMEYER, JA at p 261:

> 'There are, however, a number of cases in which the suggestion has been made that a corporation "resides" or even acquires a "domicile" at the place where its trade or business is carried on, meaning by that phrase the actual operations which earn a profit and not the central control of those operations ..... But those cases are all cases in which the question was whether the corporations concerned were amenable to the jurisdiction of courts in the United Kingdom, and it seems clear that the words "residence" and "domicile" were not used in the proper juristic sense determined by cases such as the **de Beers** case.'".

It is clear from the judgment of HOEXTER, J at 910-911 that a dual residence of a company for jurisdictional purposes is recognised when consideration of convenience require that to be done. It is true that the case concerned a foreign company which carried on business in this country, but it is worthy of note that the learned Judge, quoting the remarks of INNES, J in **Beckett's** case **supra** at 338 concerning the earlier case of **Wallis v The Gordon Diamond**

Mining Co Ltd 6 HCG 43, pointedly observed (at 910) that the question was left open in **Beckett's** case whether the same principle should be applied also to domestic companies. (I shall revert to **Beckett's** case on this point below.) In my opinion the judgment in **Appleby's** case shows that the recognition of a dual residence of a domestic company, for reasons of convenience in regard to questions of jurisdiction, would not impinge on any principle of our law. In this context no matter of principle (as opposed to mere semantics) is involved in referring to a company's place of central control as its residence "in the proper juristic sense", as in **Kootcher's** case **supra**, and to a different place where it carries on business as its "limited or partial" residence, as in **Swift v National Bank of South Africa** 1923 OPD 24 at 27 (quoted in **Appleby's** case at 910) or as "the fiction of separate residence", as in **Wright v Stuttaford & Co** 1929 EDL 10 at

37 (quoted in **Appleby's** case at 911). That being so, I can perceive no objection in principle, in the same context, to the recognition of a separate residence of a domestic company at the place of its registered office, where that is situated elsewhere than at its place of central control.

I turn to **Beckett's** case (**supra**), the facts of which have already been noted. The ambit of the actual decision in that case was a very limited one. The decision that the Witwatersrand Local Division had no jurisdiction to entertain the action should not indiscriminately be extended in effect beyond the narrow confines of the facts of the case. In so far as INNES, J in the course of his reasoning made statements of an ostensibly general tenor, they should not be applied to situations to which the learned Judge was not then addressing his mind. So, when the learned Judge said (at 334) that "the only home that a corporation can be said to

have" was at its place of central control, and that "one would say that it could only reside at one place at a time", he could not have intended to lay down inflexible principles of universal application. Indeed, this is apparent from the rest of his reasoning. In reviewing the decisions of the English Courts (at 336-7) he accepted, by implication, the propositions that, in regard to foreign companies, "a corporation might be deemed to have two residences", and that "a corporation is by a fiction supposed to have an English residence or domicile"; and he said that "the Courts devised an English residence for the company other than its real one." True, he pointed out that the English Courts did not apply this approach to domestic companies, and he declined, for reasons of convenience, to apply it to the facts of the case with which he was dealing, saying (at 338):

> "And there seems no reason why we should in connection with proceedings founded on a contract

> entered into with the head office devise a fictional residence for the defendant company at Johannesburg."

But, on the other hand, the learned Judge expressly refrained from holding that a domestic company could not have a residence, for jurisdictional purposes, at a place other than that of its central control. In **Wallis v Gordon Diamond Mining Co Ltd (supra)**, and in the American case of **Aldrich v Anchor Coal Co** (the relevant passage of which is quoted in **Appleby's** case **(supra)** at 911), it was held that a foreign company carrying on business in the area of jurisdiction of a local court is resident, for jurisdictional purposes, in that area, in relation to causes of action arising out of its business activities there. With reference to those cases, INNES, J said, at 338-9, in dealing with the position of a domestic company:

> "With regard to the contracts of local branches, the balance of convenience would probably be in favour of their being enforced by local tribunals

> competent to adjudicate upon the subject matter. But whether it would be found possible in such cases to apply to domestic companies the principle recognised in regard to foreign corporations in **Wallis v Gordon Diamond Co**, and also laid down by an American Court in **Aldrich v Anchor Coal Co** (41 Am State Rep, p 831), is a point which does not arise in these proceedings. The question is one of practice, and should remain open until it comes up directly for decision."

The question left open pertained to a place where the company carried on business, but, of course a similar question in relation to the place where a company's registered office is situated did not arise and was not adverted to at all. In my judgment, therefore, **Beckett's** case did not lay down any principle which would be infringed by holding that a South African domestic company resides, for jurisdictional purposes, also at the place of its registered office, if that is located elsewhere than at its place of central control.

It will be recalled that in **Grimshaw's** case the Court was concerned with a statutory provision which required a foreign company to lodge with the Registrar of Companies the names and addresses of one or more persons resident in the Colony, authorized to accept on behalf of the company service of process and any notices required to be served on the company. In my opinion the mere registration in the Companies Office of such names and addresses under that section cannot properly be regarded as equivalent to the position of a company's registered office in terms of section 170(1)(b) of the Companies Act. While BRISTOWE, J at 457 referred to an address under section 198(1)(c) of the 1909 Act as "the registered office" of the company, that was, with respect, really a misnomer; and that the learned Judge meant to use the phrase in a limited sense seems to be clear from his statement at 456 that the "registered office" was the place

where the company had "chosen its **domicilium citandi et executandi**". The registered office provided for in section 179(1)(b) of the present Act has, in my view, far greater significance than the registered address with which **Grimshaw's** case was concerned. Consequently I do not consider that case to be of any real moment in the context of the present discussion. I would add the following observations. The fact that some companies in practice prefer to use their registered offices as no more than a kind of postal depot, detached from the place where business is actually conducted, cannot detract from the importance which the registered office is accorded by virtue of the provisions of the Act which are mentioned by ELOFF, J in the **Dairy Board** case (**supra**) at 771 B-D. And when one is dealing with an artificial person, one must perforce work with fictions. On that score, I do not consider it to be any less acceptable to regard a company's

residence as being situated at its registered office, as compared to its place of central control, or a different place where it carries on business; nor, with respect, do I think that it is any the less artificial to regard the company as being "present" at its registered office rather than being "resident" there.

In my judgment, therefore, for the reasons given, the conclusion at which ELOFF, J arrived in the **Dairy Board** case (**supra**) was not contrary to principle or authority. In my respectful view his conclusion was juristically sound, and it merits endorsement by this Court. It appears to me, moreover, that in reaching his decision in the **Dairy Board** case ELOFF, J properly had regard to considerations of convenience. The significance of the factor of convenience was stressed by TROLLIP, JA in **Estate Agents Board v Lek** (**supra**). At 1067 E-F of his judgment the learned Judge of Appeal observed:-

> "In the present context of our unitary judicial system of having one Supreme Court with different Divisions ..... convenience and common sense, are, **inter alia**, valid considerations in determining whether a particular Division has jurisdiction to hear and determine the particular cause. See the **Sonia** case 1958(1) SA 555(A) at 562A and F, 564A; and cf **Appleby (Pty) Ltd v Dundas Ltd** 1948(2) SA 905(E) at 911."

That finding, by itself, does not conclude the appeal in favour of the appellant. The inquiry is a dual one: (1) Is there a recognised ground of jurisdiction; and, if there is (2) is the doctrine of effectiveness satisfied - has the Court power to give effect to the judgment sought? See **Hugo v Wessels** 1987(3) SA 837(A) at 849 H - 850A. In this case the second question is clearly to be answered in the affirmative. That the respondent carries on business in the Republic of Transkei and that all its assets may be found there is irrelevant.

In terms of sec 344 of the Companies Act a company may be wound up by "the Court" if it is unable to pay its debts. And, in terms of sec 12 "the Court" is any provincial or local division of the Supreme Court within the area of the jurisdiction whereof the registered office of the company or its main place of business is situate. In terms of sec 345 a company is deemed to be unable to pay its debts if, **inter alia**, a creditor to whom the company is indebted in a sum of not less than R100 has served on the company at its registered office a demand for payment thereof, and the company has for three weeks thereafter neglected to make payment thereof or to furnish reasonable security therefor. The amounts claimed by the appellant in its action total thousands of rands. Apart from the fact that (as I have found) the Court **a quo** was competent to entertain the appellant's action, it is clear that the Court **a quo** also has jurisdiction in any application

against the respondent in which an order for its winding up may be sought. Upon the grant of a winding up order a **concursus creditorum** is instituted, the effect whereof is that, to use the language of INNES, JA in **Walker v Syfret N O** 1911 AD 141 at 166:-

> "....the hand of the law is laid upon the estate....."

Winding up therefore represents a potent means of enforcement of the judgment sought by the appellant against the respondent. The order sought by the appellant is thus easily made effectual within the area of jurisdiction of the Court a **quo.**

It follows, in my view, that the Court **a quo** should have dismissed the special plea against its jurisdiction to hear the appellant's action; and that the appeal must succeed.

However, although it was not an issue pursued at any length in argument before us, I consider further that

apart from the fact that the respondent was resident within the area of its jurisdiction, the competence of the Court below to entertain the appellant's action is founded no less securely on the existence of jurisdiction **ratione domicilii.**

In the reported cases practical illustrations of domicile abound, but as yet no comprehensive and satisfactory definition appears to have been formulated. See eg Ranchod, **The Concept of Domicile in SA Law, Acta Juridica** (1970) 53 - 55; Forsyth, **op cit,** 101 - 103. In his monograph **The SA Law of Domicile of Natural Persons** Prof Kahn (at 5) quotes the statement by R A Leflar, **American Conflicts Law** (1968) at 17, that domicile is:-

> "....a legal relation between a person and a place created by law and not by the person, and designed altogether to serve the law's purposes."

Martin Wolff, **op cit,** at 106, states:-

> "A PERSON's domicile is the place or country which is considered by law to be the centre of

> his life, his 'centre of gravity', as it were. This notion is common to all legal systems; but they have very different ways of determining the place to be looked on as such centre."

What appears to have been the position at common law in England may be gathered from **Gasque v Commissioners of Inland Revenue** (1940) 2 KB 80 (an appeal against assessments to surtax) which decided that the domicile of a limited company was determined by its place of registration; and that such domicile clings to it throughout its existence. In the course of his judgment MACNAGHTEN, J remarked at 84 - 85:-

> "It was suggested by Mr Needham on behalf of the appellant that by the law of England a body corporate has no domicil. It is quite true that a body corporate cannot have a domicil in the same sense as an individual any more than it can have a residence in the same sense as an individual. But by analogy with a natural person the attributes of residence, domicil and nationality can be given, and are, I think, given by the law of England to a body corporate.....The domicil of origin, or the domicil of birth, using with respect to a company

> a familiar metaphor, clings to it throughout its existence .....
>
> The Solicitor-General called my attention to the case in the American Courts of **Bergner & Engel Brewing Company v Dreyfus"** (1898 70 Am. State Rep. 251). "The judgment in that case was delivered by HOLMES, J. Any opinion of that very eminent judge, more particularly on any question relating to the common law of England, is entitled to the highest respect in any English Court. The head note to that case, which correctly represents the decision, is this : 'A corporation has its domicil in the jurisdiction of the state which created it, and, as a consequence, has no domicil anywhere else'....."

In England the Civil Jurisdiction and Judgments Act 1982 for jurisdictional purposes attributes a domicile to corporations by assimilating domicile to the corporation's "seat"; and by prescribing rules which rely on a combination of the place of incorporation, the place of the registered office, and the place of residence as criteria for determining the seat. See Dicey & Morris, **The Conflict of Laws,** 11th ed. (1987) 1130 - 1131; Morris &

North, **Cases and Materials on Private International Law** (1984) 79 **et seq.** By way of illustration the provisions of subsections (3) and (4) of sec 42 of the Act may here be quoted:-

> "(3) A corporation or association has its seat in the United Kingdom if and only if -
>
> (a) it was incorporated or formed under the law of a part of the United Kingdom and has its registered office or some other official address in the United Kingdom; or
>
> (b) its central management and control is exercised in the United Kingdom.
>
> (4) A corporation or association has its seat in a particular part of the United Kingdom if and only if it has its seat in the United Kingdom and -
>
> (a) it has its registered office or some other official address in that part; or
>
> (b) its central management and control is exercised in that part; or
>
> (c) it has a place of business in

that part."

While reference to comparative legal systems is useful and instructive it need hardly be said that domicile is an issue to be determined by the **lex fori.** This rule applies not only in the conflict of laws to the selection stage where the **lex domicilii** may have to be determined, but obviously also in the determination of the issue whether any particular division of the Supreme Court has the competence to hear an action **ratione domicilii.** See Ellison Kahn, **op cit,** 11. The position is neatly put by Forsyth, **op cit,** 108:-

> ".....if domicile is being used as a jurisdictional link rather than as a connecting factor in a choice of law rule ..... the local court is interpreting a rule fundamental to its own power to determine the dispute....."

See further **Ex parte Jones : In re Jones v Jones** 1984(4) SA 725(W) at 727 E - F.

The tests for determining domicile are more

elaborate and elusive than those for mere residence. Since the ascription of either residence or domicile to a company derives from the equiparation of a natural person and a juristic entity both notions - as pointed out by MACNAGHTEN, J in **Gasque v CIR (supra)** - are equally impalpable. However transparent the fiction involved may be, its use is dictated by legal necessity; and the concept of domicile, no less than that of residence, must be applied to a company as best one can.

The concept of domicile encompasses both a physical and a mental element. The physical element is residence at a particular place or within a particular **rechtskring.** The question of critical importance on this part of the present case is to determine the territorial ambit of the **rechtskring** within which the respondent is domiciled. Dealing with the domicile of corporations Forsyth, **op cit**, 167, states:-

> "A corporation is notionally domiciled at its place of incorporation. A corporation may, of course, be domiciled only in the Republic as a whole and this is not sufficient for it to be domiciled in the area of any particular division of the Supreme Court. Hence, for the purpose of establishing jurisdiction in a division, domicile alone will never suffice."

That in the conflict of laws a company incorporated in South Africa with its registered office somewhere within the Republic will have a South African domicile is manifest. But it seems to me, with respect, to be far from obvious that in the situation where domicile is being invoked as a connecting factor to establish jurisdiction such a company cannot have a domicile territorially narrower and more circumscribed than a national domicile. Whatever may be the position in other legal systems I see no ground, in the light of the peculiar judicial structure of South Africa, for excluding what may conveniently be described as a "provincial" domicile.

It has been pointed out that despite the creation

of a single Supreme Court it lacks authority over the whole country; and that only divisions thereof have jurisdiction to entertain actions. For the purposes of jurisdiction the area in respect whereof a defendant is an incola or a peregrinus is the area of the division to which the court in which the action is instituted belongs. To that extent our judicial structure has a federal aspect. The complication consequent thereupon is described thus in an article on **Domicile** by Pollak in (1933) Vol 50 SALJ 449 at 456:-

> "In the light of these circumstances, can it be said that there is such a thing as a Union domicile, or can one speak only of a provincial domicile? It is submitted that no hard and fast answer can be given to this question. The answer will depend upon the nature of the inquiry in regard to which the question of domicile is raised. If the inquiry relates to the jurisdiction of a provincial division domicile in that province is necessary, and this requirement is not met by showing a permanent home in another province or a permanent home in the Union as a whole."

Dealing with money claims against corporations in his treatise on **Jurisdiction,** Pollak expresses disapproval of either residence or domicile as connecting factors to found jurisdiction; and he is minded to discard both concepts. There the learned author writes (at 92):-

> "It is proposed therefore to state the law with regard to actions against corporations without making use of the notions of domicile and residence."

I respectfully but firmly disagree with the above approach to the problem. I do not consider that it accurately reflects the current legal position in South Africa.

Despite his disinclination in principle to invoke the domicile of a corporation as a jurisdictional connecting factor, it may be noted that Pollak nevertheless recognises and accepts the existence of a "provincial" domicile in the case of a South African company. This appears from the second part of his article on domicile (see (1934) vol 51 **SALJ** at 36). Having expressed

scepticism as to whether the attribution of a fictitious domicile to a corporation serves any real useful purpose, Pollak points out, however, that in fact South African courts have used the notion; and he proceeds to discuss "what is to be considered to be the domicile of a corporation". To this end the learned author formulates a number of rules, the first of which is stated in the following terms:-

> "(1) In the case of a trading company incorporated and registered in the Union and having its principal place of business in the Union, the domicile of the company is the **Province** in which its principal place of business is situate." (Emphasis provided.)

It has already been pointed out that the concept of domicile lends itself to exemplification rather than to precise definition. Of the many definitions that have been attempted, however, it seems to me that for purposes of the present appeal (and I hasten to add, for those purposes

only) a terse but useful statement is to be found in the judgment delivered almost a century ago in the case of **In re Craignish. Craignish v Hewitt** (1892) 3 Ch 180. There CHITTY, J applied (at 192) the following definition in Story's **Conflict of Laws** (1), namely:-

> "that place is properly the domicil of a person in which his habitation is fixed without any present intention of removing therefrom."

Earlier in this judgment it has been held that by reason of the situation of its registered office in Johannesburg the respondent has its habitation ("residence") within the **rechtskring** of the Witwatersrand Local Division. On the particular facts of the instant case I further find that as long as the respondent retains that situation of its registered office, there subsists between the respondent and the area of jurisdiction of the Witwatersrand Local Division a relation, created by law, which renders the respondent domiciled, for the purposes of

founding jurisdiction, within that area.

I am careful to confine the above finding in regard to the respondent's domicile to the peculiar facts of the case, for the following reasons. If one accepts, as I do, that a company which has its place of central control elsewhere than at its registered office resides simultaneously at both places, then the question of the respondent's domicile might well have assumed a different complexion had the respondent carried on its business not in the Transkei but within the Republic and beyond the area of jurisdiction of the Witwatersrand Local Division - say, for instance, at Pretoria. While I have no difficulty in accepting that for jurisdictional purposes a company may have dual residence, it is not easy to conceive, for jurisdictional purposes,of the ascription of more than a single domicile to a company. Accordingly I would limit the selection of domicile as an alternative ground of

jurisdiction for the Witwatersrand Local Division in this case to the particular circumstance that the respondent has no place of business or central control anywhere within the Republic.

In the hypothetical example mentioned above it might be a matter of considerable difficulty to decide whether the company was domiciled within the area of jurisdiction of the Witwatersrand Local Division or that of the Transvaal Provincial Division. Since the question need not be investigated for purposes of the present appeal, I would prefer to leave it open.

The appeal succeeds with costs, including the costs of two counsel. The order of absolution from the instance with costs made by the Court a quo is set aside, and the following order is substituted therefor:-

"The first defendant's special plea raising an objection to the jurisdiction of the Court is dismissed with costs."

G G HOEXTER, JA

BOTHA, JA)
GOLDSTONE, AJA) Concur

84a/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BISONBORD LIMITED Appellant

and

K BRAUN WOODWORKING MACHINERY

(PROPRIETARY) LIMITED Respondent

Coram: HOEXTER, BOTHA, MILNE JJA NICHOLAS et GOLDSTONE AJJA.

Heard: Delivered:

9 March 1990 10 September 1990

J U D G M E N T

NICHOLAS AJA:

I am in respectful agreement with the whole of the judgment of **HOEXTER JA**, save in its endorsement of the judgment in **Dairy Board v. John T Rennie and Co Ltd** 1976(3) 768(W) and the decision that a company registered in the Republic of South Africa resides where its registered office is situated.

The word "residence" has a variety of meanings, ranging from mere physical presence to domicile. (See Pollak p 44). The learned author discusses the problem of what is meant by "residence" in relation to jurisdiction at pp 45-48, where he quotes from the judgment of **BRISTOWE J** in **Robinson v. Commissioner of Taxes** 1917 TPD 542 at 547-8. In footnote 1 on pp 46-47, he quotes a number of other judicial attempts

to describe what is meant by residence in relation to a natural person.

There is normally no difficulty in deciding where a natural person resides, but when the inquiry relates to a company some artificial test must be applied. For a company is a creation of the law, and exists only **in abstracto**.

> "The artificial legal person called the corporation has no physical existence. It exists only in contemplation of law. It has neither body, parts, nor passions. It cannot bear weapons nor serve in the wars. It can be neither loyal nor disloyal. It cannot compass treason. It can be neither friend nor enemy. Apart from its corporators it can have neither thoughts, wishes, nor intentions, for it has no mind other than the minds of the corporators."

(**per** BUCKLEY LJ in **Continental Tyre and Rubber Co. (Great Britain) v Daimler Co Ltd** 1915 (112) LTR 324 at 333.)

In **Estate Kootcher v. C.I.R.** 1941 AD 256, the disputed question was that whether the Standard Bank of South Africa Ltd was in law to be regarded as "resident" within the

Union. **WATERMEYER JA** said at 260:

> "Now it has been frequently pointed out that when the words 'reside' or ' resident' are used in connection with a corporation to indicate its presence in a place for some period of its corporate existence, the words are used in a figurative sense and can only be given a meaning analogous to the meaning of the words used with regard to a human being. A human being has a body and a mind and the mind always accompanies the body; the mind therefore resides (if a mind can be said to reside) where the body resides. A corporation has no body but it has what by analogy can be called a directing mind. In a human being the location of the body with its attendant mind, if such location be periodic or usual or habitual, determines the residence of that human being, and it is therefore to be expected that the residence of a corporation will be determined by the periodic, usual of habitual location of the directing mind. In the case of De Beers Consolidated Mines v. Howe, (1906, AC. 455, at page 459, LORD LOREBURN stated the law as follows:
>
> > 'In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may

> a company... A company resides for purposes of income tax where its real business is carried on ... the real business is carried on where the central management and control actually abides ...'

"This passage has been quoted with approval and followed in numerous cases of the highest authority."

Like **De Beers**, **Estate Kootcher** was a tax case, but the same principle was stated by the Appellate Division in a case relating to jurisdiction under s 16 of the Transvaal Administration of Justice Proclamation. **INNES J** said in **T W Beckett and Co Ltd v. Kroomer Ltd** 1912 AD 324 at 344:-

> "Now the terms "reside" and 'residence' can only be used in their true significance with regard to natural persons. The residence of a legal persona like a company, artificially created, must be a mere notional conception introduced for purposes of jurisdiction and law (see Foote, p. 112). The only home which a corporation can be said to have is the place where the operations for which it was called into existence are carried on. So far as it can be said to reside anywhere, that is where it resides. And if the analogy of a natural person is to be followed, one would say that it could only reside in one place at one time. The doctrine is firmly established that where a company carries on

> business at more places than one its true residence is located where its general administration is centred. To quote the words of Lindley (Companies, 6th Ed., p. 1223), 'The residence and domicile of an incorporated company are determined by the situation of its principal place of business. This is not only the opinion of the most recent writers on private international law, but is supported by the decisions of our own Courts. By the principal place of business is meant the place where the administrative business of the company is conducted; this may not be where its manufacturing or other business operations are carried on.'"

However, in **Dairy Board v John T Rennie and Co (Pty) Ltd** (supra) where the question was whether the WLD had jurisdiction over the defendant company **ELOFF** J held that a company registered in South Africa resided in law where its registered office is. The defendant's registered office was within the court's area of jurisdiction, but its business activities were conducted from Durban, where its management was situated, its books of account were kept, its directors met most of the time, and its business was controlled. The learned judge posed the question, "In the light of the

circumstances can it be said that defendant resides or is in the Witwatersrand within the meaning of s. 19?" His answer was affirmative:

> "In my view, a company registered in South Africa resides in law where the registered office is. If its principal place of business is situated elsewhere it may also reside at the latter place."

He accordingly held that the WLD had jurisdiction in the matter. In my respectful opinion this conclusion is contrary to principle and authority, and cannot be supported.

Having referred to dicta in T W Beckett (supra) **ELOFF J** observed that the court did not there have to consider whether a company might not be said to reside or be where its registered office is, and said (at 770 H):

> "What is, in my opinion of importance in the judgment in Beckett's case, is that the Court considered that there is a close correlation between the duty of a company to accept service at a particular place and its place of residence. On p. 339 the concluding paragraph of the judgment reads:
>
> > 'For the purpose of this case it is not necessary to say more than that a company

> should not be compelled to accept service anywhere, save at its central office, of process the object of which is to enforce or recover damages in respect of a contract entered into with the officials of its central administration.'"

I do not think that this passage provides support for **ELOFF** J's opinion. What **INNES J** was saying was that a company should be compelled to accept service at its central office and at no other place - he was not saying that if a company was obliged to accept service at some other place, that place was to be considered as its residence.

ELOFF J went on to say that this correlation between the place at which service may be effected and jurisdiction over a corporation was

> "...in accordance with what was said by Cheshire, Private International Law, 7th ed., p. 174, as follows:
>
> 'If he is found here he can be served here and at common law the exercise of jurisdiction depends on service. It is

> the same in the case of a corporation.'
>
> Gower Modern Company Law, 3rd ed., p. 447, is to similar effect where he says sub voce 'The company's home':
>
> > 'By the expression 'home' we mean the office at which the registers have to be kept and where service is to be effected.'"

Cheshire is not a safe guide on this point, because in our law, differing from the English common law, the exercise of jurisdiction does not depend on service. In any event, where the question is whether a defendant resides within the court's jurisdiction, this is not shown by the fact that he can be served there.

Nor does Gower provided the learned judge with support. The sentence quoted by **ELOFF J** is in the section of the book headed "Matters requiring registration at the Companies' Registry." The definition quoted reflects what "we" (i.e. the authors) mean by "home" - an expression which is not used in the Companies Act. And the sentence is followed immediately by the statement, "It is not necessarily

its 'residence' in the technical sense....."

ELOFF J said at 771 B-D that the factor of the places at which a company can be served with process

> " ...assumes importance if it be borne in mind that sec. 170(1) of the Companies Act, 61 of 1973, as also its predecessor in the 1926 Companies Act mentions the registered office as the one 'at which all process may be served'. And not only does the Companies Act render the registered office the place at which service can be effected; it is also the place where a minute book of the general meetings of the company is to be kept (sec. 204); as also the register of allotment of shares (sec. 93); the register of members (sec. 105); a register of pledges and bonds (sec. 127); a register of debenture holders (sec. 128); a register of directors and officers (sec. 216); a register of material interests of directors and other insiders in the shares and debentures of the company (sec. 230 and sec. 231); a register of declaration of interest in contracts by directors and officers (sec. 240); a register of attendance of directors' and managers' meetings (sec. 245): and a register of fixed assets (sec. 284.p 22.
>
> The totality of these provisions seem to me to attract the inference that the Legislature intended to endow the registered office with the quality of being the place to which the world can look as the legal home and administrative centre of the company."

I respectfully disagree with this conclusion. The records

referred to are not the **lares et penates** of a company's home. They are kept at the company's registered office only because the Companies Act requires it, presumably in order that they should be accessible at a fixed and ascertainable place for inspection by those entitled to inspect them. A company's registered office is frequently situated at the offices of an attorney or auditor , whose connection with the company may be no more than professional, and who may not otherwise exercise his mind in the administration of the company's affairs. The presence of the registered office is usually indicated by a board affixed to the wall outside the reception office, frequently among a number of similar boards for other companies. And no more is required of the attendant employee concerned, than that she should accept service of process, and receive communications, and produce for inspection the records above referred to. In **Grimshaw v. Mica Mines Ltd** 1911 TPD 450 **BRISTOWE J** referred at 456-457 to the fact that the registered office is usually the place

where the company is controlled and where the general superintendence of its affairs takes place, but added:

> "... But it is not necessarily so. The registered office may be merely a place where notices and summonses can be served on the company, a mere address for service, at which no business at all is carried on. It cannot be said that, because the company has a registered office where nothing more than that is done, it carries on business there."

And see the speech of **VISCOUNT SUMNER** in Egyptian Delta Land and Investment Company v Todd 1929 AC at 14-15.

I stated at the outset that I agreed with **HOEXTER JA** that the Witwatersrand Local Division is the defendant company's forum domicilii. For the reasons given by my learned colleague it is manifest that it has a South African domicile. Where the question relates to the jurisdiction of a division of the Supreme Court however it is insufficient that a company is domiciled in the Republic; it is necessary that it should have a local domicile within the area of jurisdiction of that division. Where it has its principal

place of business within such area, it may properly be said to be domiciled there; but where it does not have its principal place of business in the Republic, then, for want anything better, it must be said to be domiciled in the area in which it is regarded as being present.

SOLOMON ACJ pointed out in Madrassa Anjuman Islamia v. Johannesburg Municipal Council 1919 AD 439 at 449 that -

> ".. it is clear that a company can no more 'occupy' than it can reside on a stand. For a company is a purely legal conception: it has no physical existence, but exists only in contemplation of law, so that it is incapable of being physically present at any place."

But just as a residence can for certain purposes be attributed to a company, so can a presence. And in my opinion the legislature, in requiring in s 170(1) of the Companies Act that every company shall have a registered office in the Republic, has attributed to the company a statutory presence there. It is the place at which the

company may always be found. The provision in s 170(1)(d) that a change in the situation of the registered office of a company shall not take effect unless the Registrar has recorded the particulars thereof, is designed to ensure that, for any purpose of the Act, there is always a place which is the registered office. All communications and notices may be addressed, and all process may be served there, and the company's records referred to by **ELOFF** J in the Dairy Board case may be inspected there. Moreover s 12(1) provides that the court which has jurisdiction under the Act in respect of any company, shall be any provincial or local division of the Supreme Court within the area of jurisdiction whereof the registered office of the company or the main place of business of the company is situated.

The considerations of convenience referred to in the **Dairy Board** case **(supra)** at 771 G-H, citing **Appleby (Pty) Ltd v Dundas Ltd** 1948(2) SA 905(E) at 911, call imperatively for some place, the location of which is ascertainable at the

Companies Registry, at which the company may with certainty be found to be "present". That place is the registered office.

In the present case the principal place of business of the defendant is in Transkei. It does not carry on business in South Africa. Apart from the fact that it was incorporated in South Africa, its only connection with the Republic is that its registered office is in Johannesburg. It is therefore within the jurisdiction of the WLD that the defendant must be taken to be domiciled.

NICHOLAS AJA

MILNE JA concurs