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Case No. 654/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

NAHRUNGSMITTEL GmbH Appellant

and

HEINZ BERND OTTO Respondent

CORAM: HOEXTER, VIVIER, KUMLEBEN, F H GROSSKOPF, JJA et VAN COLLER AJA

HEARD: 16 NOVEMBER 1992

DELIVERED: 27 NOVEMBER 1992

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J U D G M E N T

HOEXTER, JA.....

HOEXTER, JA

The appellant is a company incorporated in Germany which carries on business at Mannheim and Frankfurt am Main. The appellant belongs to a group of German companies headed by CO-OP AG ("Co-op") which carries on business in Germany. The respondent, Dr Heinz Bernd Otto, is a German citizen. In what follows I shall refer to the appellant as "the applicant" and to the respondent as "Otto". In April 1990 the applicant applied in the Cape of Good Hope Provincial Division for the provisional sequestration of Otto's estate. The application was opposed. Voluminous affidavits were filed on either side and the matter was argued for three days before Conradie J. Having reserved judgment thereon the learned judge delivered a judgment ("the first judgment") in which he granted a provisional sequestration order. The first judgment has been reported: **Nahrungsmittel GmbH v Otto**

1991(4) SA 414(C). On the extended return day of the provisional order the matter was argued for four days before **Nel J.** Having reserved judgment **Nel J** gave judgment ("the second judgment") in which he discharged the provisional order with costs. The second judgment has also been reported: **Nahrungsmittel GmbH v Otto** 1992(2) SA 748(C). Against the whole of the second judgment the applicant noted an appeal to this court. The appeal was argued by Mr **Eloff.** Mr **Duminy** appeared for Otto.

The allegations and counter-allegations made in the many and wordy affidavits filed in the proceedings are explored at length in both judgments. Save for saying that not all of them were admissible in evidence no recapitulation is necessary. In the course of this judgment brief mention will be made to some of the more salient facts.

In terms of sec 149(1) of the Insolvency Act 24

1936 ("the Act") a provincial or local division of the Supreme Court has jurisdiction over a debtor on the grounds, **inter alia**, (i) that, on the date on which a petition for the sequestration of his estate is lodged with the registrar of the court, the debtor owns or is entitled to property situate within the jurisdiction of the court; or (ii) that at any time within twelve months immediately preceding the lodging of the said petition the debtor "ordinarily resided" within the jurisdiction of the court. As appears from the first judgment (at 422F) in the proceedings before **Conradie J** it was "not disputed" on behalf of Otto that on the date of lodgment of the petition for sequestration by the applicant (24 April 1990) Otto was entitled to property within the jurisdiction of the Cape Provincial Division. The property in question, so **Conradie J** considered (at 422G) -

> "....was a claim for costs which had been awarded to the respondent [Otto] against Co-op in earlier

abortive sequestration proceedings."

What Otto did emphatically deny was the applicant's averment that within the relevant period he had been "ordinarily resident" within the court's jurisdiction.

Apart from the fact that such ordinary residence would have constituted a further ground of jurisdiction, the issue of Otto's ordinary residence was relevant in another connection. In terms of the proviso to sec 149(1) of the Act the court may refuse the sequestration sought when it appears to the court -

> "....equitable or convenient that the estate of a person not domiciled in the Republic be sequestrated elsewhere."

Counsel for Otto submitted to **Conradie J** that if Otto were not ordinarily resident within the court's jurisdiction, the court would the more readily exercise its discretion under sec 149(1) to order that Otto's estate be sequestrated elsewhere. This proposition the learned

judge accepted; but he went on to find as a fact (see 421B; 422H) that Otto was in truth ordinarily resident in Cape Town. In the course of a lengthy judgment **Conradie J** further concluded (at 427G) that all the defences relied upon by Otto failed, and that a provisional order should be granted.

In the proceedings before **Conradie J** the disputed issues (summarised by the learned judge at 417G-418B) ranged far and wide. One of the grounds of opposition was that the applicant did not rank as Otto's creditor inasmuch as the applicant had ceded its claim against Otto to Co-op. The alleged cession was embodied in a document ("the document") which is described as an "Einzugsermächtigung". It had been drawn up in Germany in the German language, and an English translation thereof was presented to the court. In affidavits before the court two deponents conversant with German law stated their respective and conflicting

expert opinions as to the proper construction to be put upon the document. In the first judgment **Conradie J** proceeded to consider whether or not the document embodied what in South Africa would be regarded as an outright cession. The learned judge concluded (at 424H-I) that, upon a proper interpretation of its terms, the document did not give Co-op **locus standi** to sequestrate Otto's estate.

There are, of course, occasions on which a court cannot determine a disputed issue without deciding what the law of a foreign country is in regard to a particular matter. This was perhaps not such a case. Moreover, even upon a finding that Otto had been ordinarily resident within the court's jurisdiction, it seems to me, with respect, there might have been much to commend the exercise of a judicial discretion in favour of an order that Otto's estate be sequestrated elsewhere. The applicant was a

German company. Otto was a German national possessed in Germany of substantial (albeit that they were frozen) assets. In addition, at the time of the application Otto was very firmly on German soil in such circumstances that his early departure from his native country was hardly imminent. Last but not least, one of the grounds of opposition to the grant of a provisional order involved a ticklish construction of a German contract.

Upon the extended return date **Nel J** discharged the provisional order on two grounds. First, for the reason that the concession made before **Conradie** J that Otto had owned property at the relevant time within the jurisdiction of the court had been wrongly made; second, for the reason that the applicant had failed to prove that the court had jurisdiction over Otto based on the latter's "ordinary residence" at Cape Town within the relevant period.

Before considering the correctness or otherwise Of the merits of the appeal against the judgment below it is necessary to deal briefly with two preliminary matters. The first relates to the procedural propriety of the applicant's appeal to this court. In this connection counsel for Otto raised an objection **in limine.** Mr **Duminy** urged upon us that in this case no appeal to the Appellate Division lay without prior leave granted by **Nel** J; and that since such leave had been neither sought nor granted the appeal should be struck off. For the reasons which follow the preliminary objection appears to me to be unfounded.

Sec 150(1) of the Act provides that any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may appeal against such order. An obstacle in the way of Mr **Duminy's** contention is presented by the judgment in **Fourie**

**v Drakensberg Koöperasie Beperk** 1988(3) SA 466(A). In that case this court unanimously decided that the right of appeal expressly granted by sec 150(1) of the Act:

(i) tacitly includes a right of appeal to the Appellate Division; (ii) that such right is not subject to the provisions of sec 20(4) of the Supreme Court Act 59 of 1959 as amended ("the SC Act"); and (iii) that leave to appeal against either of the orders mentioned in sec 150(1) of the Act is accordingly not a prerequisite to such an appeal.

Mr **Duminy** submitted that in deciding that the right of appeal conferred by sec 150(1) of the Act is not subject to the provisions of sec 20(4) of the SC Act, this court fell into manifest error; and that we should not follow the decision. I am unable to see any good ground for questioning the correctness of that decision. Sec 20(4) of the SC Act reads as follows:-

> "No appeal shall lie against a judgment or order of the court of a provincial or local division in

> any civil proceedings or against any judgment or order of that court given on appeal to it except -
>
> (a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;
>
> (b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division."

However, sec 20(6)(b) of the SC Act provides that the power to grant leave to appeal as contemplated in sec 20 -

> "shall be subject to the provisions of any other law which ... specifically grants ... any right of appeal."

Now sec 150(1) confers a right of appeal in the two instances in terms which are quite unqualified. Counsel recognised the absolute nature of the right of appeal granted by sec 150(1), but he suggested that the consequence flowing therefrom was simply that the result of the indispensable application for leave was necessarily a

foregone conclusion; the court which had made the order, so the argument ran, would be legally obliged to grant leave to the aggrieved person, and the sole function of the judge so granting leave would be to decide whether the appeal should be heard by the appellate division or the full court of the division concerned. I am unable to accept this argument. The legal concept of an absolute right of appeal is the antithesis of the notion of the requirement of an application for leave to appeal, and overrides any question of the appropriate forum. It seems to me that the meaning naturally and properly to be assigned to sec 20(6)(b) of the SC Act is the following: where a statute other than the SC Act specifically grants a right of appeal to a dissatisfied litigant, such right displaces the requirement of leave to appeal imported by sec 20 of the SC Act. So to construe the provisions of the subsection avoids the quixotic consequence implicit in

the construction of the subsection for which counsel contends. Accordingly the objection **in limine** cannot be sustained, and the application on behalf of Otto for the striking off of the appeal is refused.

The second preliminary matter raises the question (in regard to which counsel were unable to cite any authority precisely in point) whether on the return day it was open to **Nel J** to reconsider and reverse the finding of **Conradie J** that the court had jurisdiction to sequestrate Otto's estate. Sec 12 of the Act reads as follows:-

> "12(1) If at the hearing pursuant to the aforesaid rule **nisi** the court is satisfied that -
>
> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in sub-section (1) of section nine; and
>
> (b) the debtor has committed an act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the

> debtor if his estate is sequestrated,
>
> it may sequestrate the estate of the debtor.
>
> (2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not **sine die.**"

In terms of sec 149(2) of the Act the court is given the power to -

> "....rescind or vary any order made by it under the provisions of this Act."

Mr **Eloff** strenuously submitted that the discretion vested in the court on the return day is narrowly circumscribed and that it does not entitle the court then to re-examine the finding of jurisdiction by the court which issued the provisional order. That being the position, so counsel further contended, in considering the appeal against the judgment below this court should

disregard the contents of an affidavit by Otto's wife ("Mrs Otto's further affidavit") filed subsequent to the grant of the provisional order. Mr **Duminy**, on the other hand, argued that it could not have been the intention of the Legislature that any finding made by a court at the stage of the grant of a provisional order should be final and irreversible. He pointed out, moreoever, that the Act (see sec 11(1)) neither prescribes nor limits the grounds whereon a debtor may rely in showing cause on the return day why his estate should not be sequestrated.

For purposes of the present appeal it is unnecessary for us to express any final conclusion on the above issue. Mr **Eloff** properly conceded that, irrespective of the answer to the question, it is clear that this court is entitled to consider the correctness of **Conradie J**'s finding on jurisdiction. In addition it does not appear to us that what is said in Mrs Otto's further

affidavit makes any real contribution to a solution of the issues on appeal; and we propose to disregard it. For purposes of the appeal we shall assume in favour of the applicant that Mr **Eloff**'s submission in regard to the powers of the court on the return day is valid.

The conclusion reached by **Nel** J in the second judgment that the applicant had failed to establish that the Cape Provincial Division had jurisdiction over Otto rested on findings that on the affidavits before him it had been proved neither (a) that at any time within twelve months immediately preceding the lodging of the petition for sequestration Otto had "ordinarily resided" within the jurisdiction, in terms of sec 149(1)(b) of the Act (at 760B-C); nor (b) that on the date on which the applicant's petition was lodged with the registrar Otto owned or was entitled to property within the jurisdiction of the court, in terms of sec 149(1)(a) of the Act (at 754D-E). For the

reasons undermentioned it appears to me that both the findings indicated above were correctly made. In my judgment **Conradie J** erred in granting a provisional order of sequestration. I shall deal in turn with each of the jurisdictional issues on which the result in the appeal hinges.

(A) THE ISSUE OF OTTO's ORDINARY RESIDENCE

Dealing with a court's statutory jurisdiction to entertain an application for sequestration of a debtor's estate **Millin J** put the matter crisply thus in **Ex parte Eksteen** 1938 WLD 224 at 225:-

> "The question whether a man is ordinarily resident at a place is one of fact and it must be decided on the facts which it is the petitioner's duty to put before the Court ...."

In my opinion the applicant in the present case failed to discharge that duty. Suffice it to say that upon a perusal of the affidavits (excluding Mrs Otto's further

affidavit) I find myself in agreement with the following summary of the position at 760B-D in the second judgment.

> "The applicant has adduced no evidence at all that the respondent [Otto] has been ordinarily resident in Camps Bay at any time during the relevant period. Bean has no personal knowledge of this issue, as can be seen from the various statements made by him in other proceedings."

Apart from the fact that Mr Bean appears to lack personal knowledge in regard to the issue, it is significant that in various affidavits made by him during the year 1989 in other proceedings involving Otto, and in which the place of residence of the latter was a crucial factor, Mr Bean, so far from suggesting that Otto was resident within the court's jurisdiction, categorically asserted that Otto was a peregrinus of the Cape Provincial Division. The relevant sworn statements are catalogued at 756A-D of the judgment below. The following fact is also noteworthy. In the abortive sequestration proceedings launched against Otto by Co-op the latter's attorney was Mr Bean. An

application by Otto in those proceedings for Co-op to furnish security for costs was resisted by Co-op. In a formal notice to the registrar filed on behalf of Co-op, signed by Mr Bean, one of the two grounds of opposition to the application for security was stated thus:-

"(b) The Respondent [Otto] is a peregrinus."

This document was signed by Mr Bean on 25 October 1989. Some nine or ten days later (on 3 November 1989) Otto was arrested in Germany.

In **Cohen v Commissioner for Inland Revenue** 1946 AD 174 **Schreiner JA** (at 185) stated **obiter** of a person's "ordinary residence" that it would be -

> "....the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called **his usual or principal residence and it would be described more aptly than other countries as his real home."** (Emphasis supplied).

Recently reference to the above **dictum** was made by this court, with apparent approval, in **Commissioner for Inland**

**Revenue v Kuttel** 1992(3) SA 242(A) at 248F-G. In the course of delivering the court's judgment in the latter case **Goldstone JA** had earlier (at 247F-G) remarked:-

> "The words 'residence' or 'resident' are well known to lawyers. They are frequently used, for example, with regard to the question as to persons who may be subject to the jurisdiction of a court or tribunal and with regard to revenue laws. That a person may have more than one residence at any one time is clear. In the present case we are concerned with the words "ordinarily resident'. That is something different and, in my opinion, narrower than just 'resident'."

It is clear that when life in Germany became difficult for Otto he and his family became birds of passage, and that they travelled much from country to country - often with Otto travelling on his own. According to Otto he was, at the relevant time, ordinarily resident in Canada; and he had started a business there. During part of 1989 he had stayed temporarily at the house in Camps Bay, so Otto said, to deal with Co-op's litigation

against him; and in order to spend some time with his family. There is no evidence to show that during the years 1987 - 1989 Otto's visits to Cape Town were anything more than sporadic sojourns.

In the first judgment Conradie J considered (at 421D) that Otto's evidence was "altogether too flimsy to support the conclusion that he ordinarily resided" in Canada. The real inquiry, however, was whether the applicant had successfully demonstrated that at the relevant time Otto had been habitually and normally resident in Cape Town, and that Cape Town could be described more aptly than other countries as Otto's real home. This question must be answered in the negative. There is nothing to show that Otto's claim that he regarded Canada as his home was an improbable one. Otto had met his wife in Hong Kong and married her in Canada. Their two children were born in that country. He had a married

sister living in Canada. His evidence that he had set about establishing a business in Canada is uncontradicted. It is true that after his arrest Mrs Otto and the children remained on in Cape Town; but there appears to be no good reason for doubting Mrs Otto's evidence that this was dictated by circumstances beyond her control.

In weighing the probabilities on this issue **Conradie J** regarded as significant (see 421E-422C) certain written submissions made in regard to Otto's place of residence by a German attorney for use in a German court. These submissions were contained in a document, dated 6 November 1989, and drafted in German. In the proceedings before **Conradie J** an English translation of this document was produced to the court. The translation was not, however, certified correct by a sworn translator of the court as is required by Rule 60. On behalf of Otto formal notice of an application was given to strike out a large

number of passages in the applicant's founding and replying affidavits. The notice included, **inter alia**, an objection to the translation in question based on non-compliance with Rules 59 and 60. Although no mention thereof is made in the first judgment, counsel informed us that in argument his objection to the translation was specifically raised. The translation was inadmissible, and it is not clear for what reason, if any, the court had regard to it.

(B) IN WHAT LOCALITY WAS OTTO'S RIGHT TO LEGAL COSTS SITUATE?

One is concerned here with intangible property rights which can have no physical locality. When the petition for sequestration was lodged there was in existence simply a certificate by the taxing master, dated 3 February 1990, awarding Otto costs. Those costs were unpaid when the petition was lodged. The certificate of

the taxing master did not constitute Otto's right to costs; it merely evidenced it. In the second judgment **Nel J** correctly invoked the legal fiction that movables follow their owner. The learned judge observed (at 753 G-H) -

> "At all material times the respondent was in a cell in Germany and the 'Co-op' a German firm carrying on business in Germany. The claim for the payment of costs which the respondent [Otto] had was an incoporeal movable which did not have an existence separate from that of the respondent. There was thus no 'property' of the respondent within the jurisdicion of this Court."

In **Trustee of Howse, Sons & Co v Trustees of Howse, Sons & Co** (1884) 3 SC 14 **De Villiers CJ** said (at 19):-

> "The general rule relating to movable or personal estate is that it is subject to the same law as that which governs the person of the owner, in other words the law of his domicile. This rule is expressed in the civil law by the maxim, **mobilia sequuntur personam,** and by the quaint saying, **mobilia ossibus inhaerent.**"

In the first paragraph of the passage from **Voet 1.8.30** quoted by **Nel** J (at 753 H - 754 E) the view is expressed that incorporeal movables are deemed to be at the place of

the creditor's domicile. In the second paragraph **Voet** goes on to say that there are, however, "some who confine these actions to the residence of the debtor, since payment may be exacted there."

In **Union Government v Fisher's Executrix** 1921 TPD 328 **Wessels JP** (at 333) remarked:-

> "Now we have the authority of Grotius in one of the **Opinions** given by him in the **Hollandse Consultaties** for the proposition that, in order to determine the domicile of the debt one has to see where the debtor is domiciled. It occurs in Vol III., Consult. 151. It is also to be found in de Bruyn's translation, **Opinion** No 33. He states there that obligations and other personal claims are neither movables nor immovables, but constitute a separate third class of property. Such claims are not governed by the law of the place where the creditor resides, but where the debtor is, and where fulfilment can be demanded and exacted **instanter.**"

The above exposition by **Wessels JP** was cited with approval by **Innes CJ** in **Randfontein Estates Gold Mining Co Ltd v Custodian of Enemy Property** 1923 AD 576, in which this court had to decide upon the question whether bearer shares

and bearer debentures of a company registered in the Transvaal were "property" within this country as defined by the Treaty of Versailles. Dealing with the incorporeal rights evidenced by the company documents there in issue, and having referred to **Grotius** Cons. Vol III N 151, **Innes CJ** (at 581) put the matter thus:-

> "There is no need however to consider the application to them of the doctrine **mobilia personam sequuntur,** nor to discuss the statement of **Grotius** that **actiones personales** are governed by the law of the debtor's domicile. Because the point to be determined is not what system of law governs the disposition or devolution of such rights, but **where they are legally situated.** Now the only attribute of locality which they possess must relate to the locality **where the debtor resides.** It is there that performance is due, and it is there that the debtor must be sued if performance is to be exacted. It is only there that such incorporeal property can be regarded as localised."
> (Emphasis supplied).

Mr **Eloff** sought to avoid the consequences of the principle so described by **Innes CJ** in the abovementioned case by relying on the recent decision of this court in **Longman**

**Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd** 1990(2) SA 906(A). The appellant ("Longman") in that case was a **peregrinus** of the Cape Provincial Division; and the respondent ("Drop Inn") an incola. In previous litigation between the parties a costs order had been made in favour of Longman. At the instance of Drop Inn an order of attachment **ad fundandam jurisdictionem** of the costs order was granted. This court held that if the requirements of such an order were otherwise satisfied the grant of the attachment order was not against public policy. Mr **Eloff** called particular attention to the following statement by **Nicholas AJA** (at 915A):-

> "The essential fact is that Longman became possessed of property attachable within the area of jurisdiction of the Cape Provincial Division...."

Counsel for the applicant contended that if a costs order in favour of a **peregrinus** is liable to attachment to found jurisdiction it necessarily follows that the **situs** of the

right involved is within the court's jurisdiction. This argument based on the **Longman** case (**supra**) is unsound. So far from supporting counsel's submission, the **Longman** case provides a precise illustration of the principle enunciated by **Innes CJ** in the **Randfontein Estates** case (**supra**). In the **Longman** case the order of costs granted in favour of Longman and against Drop Inn rendered Drop Inn a debtor. That debtor was an incola of the court; and the **situs** of the incorporeal which Drop Inn sought to attach was therefore Cape Town. In the instant case the taxing master's certificate rendered Co-op the debtor. Here, however, the debtor is a German company resident in Germany. Consequently the locality of the incorporeal property evidenced by the taxing master's certificate was not Cape Town but the place of residence of Co-op.

For the reasons aforegoing it follows that **Conradie J** should not have granted a provisional order of

sequestration and that no grounds exist for disturbing the order made by **Nel J.**

The appeal is dismissed with costs.

G G HOEXTER, JA

VIVIER, JA )
KUMLEBEN, JA )
F H GROSSKOPF, JA ) Concur
VAN COLLER, AJA )