CASE NO: 354/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

NORMAN DAVID SIMON NO.

APPELLANT

and

AIR OPERATIONS OF EUROPE AB 1ST RESPONDENT
INTERNATIONALE NEDERLANDEN
LEASE ISLAND BV 2ND RESPONDENT
FIRST NATIONAL BANK OF
SOUTHERN AFRICA LIMITED 3RD RESPONDENT

CORAM: SMALBERGER, HOWIE, PLEWMAN, STREICHER JJA et NGOEPE AJA

HEARD: 4 SEPTEMBER 1998

DELIVERED: 25 SEPTEMBER 1998

JUDGMENT

SMALBERGER JA ...

SMALBERGER JA:

The appellant is the duly appointed liquidator of Logans Tour Operators (Pty) Ltd (in liquidation) ("Logans"). Prior to being placed in provisional liquidation on 25 August 1995, Logans carried on business as a tour operator. The first respondent ("Air Operations") is a Swedish company which conducts business as a lessor and operator of aircraft. The second respondent ("ING Aviation"), a Dutch company, is a financier in the airline industry. Although Air Operations is financed by ING Aviation it is common cause that they are separate and independent legal entities.

On 19 December 1993 Logans and Air Operations entered into a written agreement described as a "Wet Lease/Operating Agreement" ("the agreement"). In terms of the agreement Air Operations undertook

to lease an aircraft to Logans from time to time for flights on specified routes. It also assumed responsibility for the operational requirements of the aircraft such as maintenance, the provision of a crew and flight arrangements. In return Logans was to pay for the hire of the aircraft according to prescribed rates. To ensure payment Logans was required to open an irrevocable letter of credit in favour of Air Operations in a specified amount. Logans duly complied with its obligations in this regard and an aircraft was put at its disposal as envisaged by the agreement.

During March 1994 Air Operations transferred its right to receive payments from Logans to ING Aviation (about which more later). In about September 1994 the letter of credit was due to expire and with it the approval that had been granted by the foreign exchange control

authorities to remit abroad funds derived from such payments. In anticipation of this happening ING Aviation opened a bank account in Johannesburg with the third respondent ("the bank account"). It was agreed between Logans and ING Aviation that upon expiry of the letter of credit all payments required to be made by Logans would be paid into the bank account. This was done, and the monies so paid were held in the account pending authorisation by the relevant authorities for their remittance overseas.

From about February 1995 Logans began to experience cash flow problems. This resulted in its failing to make certain payments as they fell due in terms of the agreement. Logans attributed its problems in this regard to alleged breaches by Air Operations of various terms of the agreement. Attempts to overcome Logans's difficulties failed.

Eventually flights were suspended and Air Operations purported to cancel the agreement with effect from 28 June 1995. On 23 August 1995 ING Aviation made written demand for payment by Logans of more than one million dollars. Two days later Logans was provisionally wound-up. The amount then standing to the credit of ING Aviation in the bank account had grown to approximately R13 million. Authorization had been sought to remit the funds abroad. The required authorization was granted on 6 February 1996.

It is common cause that both Air Operations and ING Aviation are foreign peregrini of the court (the Witwatersrand Local Division) within whose area of jurisdiction the bank account at all relevant times was situate. On 7 February 1996 the appellant sought by way of an urgent application, and was granted, (by Goldstein J) an order in that court

against the three respondents in the following terms:

"1. Directing and authorising the attachment of all funds standing to the credit of ING Aviation Lease banking account number 250805046905927185 First National Bank account number 046905927185 in the name of Second Respondent at the Bank City branch (Johannesburg) of the Third Respondent ("the bank account") ad fundandam vel confirmandam juridictionem an action which the Applicant intends to institute against the First and/or Second Respondent for the following relief:

1.1 Enforcement of the agreement pertaining to the withdrawal of funds referred to in paragraph 31 of the founding affidavit.

1.2 Repayment of all monies standing to the credit of the bank account.

1.3 Payment of US$2,7 million, alternatively, the Rand equivalent thereof calculated as at the Rand/Dollar exchange rate prevailing on the date on which payment is made.

1.4 Interest on the aforesaid amounts a tempore morae.

1.5 Costs of suit.

1.6 Further and/or alternative relief.

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1.7 Interdicting the First and Second Respondents from transferring or causing to be transferred any monies standing to the credit of the bank account from such account pending the determination of the action.

1.8 Interdicting and restraining the Third Respondent from transferring or giving final effect to any instruction to transfer any monies standing to the credit of the bank from such account pending the determination of the action. Such interdict to include the retraction of the instruction to transfer such monies in the event of the 'for value date' not having passed.

3. That the relief set forth in 1 and 2 above operate as an interim order with immediate effect.

4. That a Rule Nisi do hereby issue, returnable on a date to be determined by the above Honourable Court, calling upon the First, Second and Third Respondents and any other interested parties to show cause why orders 1 and 2 above should not be made final."

Paragraph 4 of the court's order simply slavishly followed the wording of the notice of motion and did not stipulate a return date. Despite this defect in the order, answering and replying affidavits were filed and the matter eventually came before Nugent J. On 29 April 1996 the learned judge dismissed the rule nisi and set aside the interim interdicts, with costs, including the costs of two counsel. He refused leave to appeal but the appellant was subsequently granted leave to appeal to this Court on petition to the Chief Justice. In his petition the appellant acknowledged that the funds in the bank account belonged to

ING Aviation and that Air Operations had no claim on them. He accordingly confines the relief he seeks on appeal to ING Aviation.

It is common cause that on 2 May 1996, after the appellant's petition had been served on the respondents, but before leave to appeal had been granted, ING Aviation launched an application in which it sought, inter alia, an order that effect be given to the court a quo's judgment discharging the rule nisi. The application was granted by Nugent J on 8 May 1996, subject to security de restituendo in the form of a guarantee being provided by ING Aviation in the event of leave to appeal being granted and the subsequent appeal being successful. The order was subject to certain conditions, one being that "the guarantee shall in any event lapse after the expiry of a period of two years from the date of issue thereof. The guarantee was duly furnished, and the

monies standing to the credit of ING Aviation in the bank account were transferred overseas. The date of issue of the guarantee was 8 May 1996. No steps were taken to extend the period of the guarantee and it accordingly expired on 8 May 1998. Subsequently the appellant initiated proceedings in the Witwatersrand Local Division in which the relief eventually sought was an order directing ING Aviation to provide security de restituendo by furnishing a fresh guarantee. On 28 August 1998 Nugent J dismissed the application with costs. We were informed from the bar that the appellant intends to seek leave to appeal against the dismissal of the application.

These events gave rise to the filing of supplementary heads of argument on behalf of ING Aviation two days before the hearing of the appeal. It was contended that the appeal fell to be dismissed by virtue of

the provisions of sec 21 A(l) of the Supreme Court Act 59 of 1959. The section presently reads:

> "When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

The contention was based on the following considerations. In paragraph 3.6 of his heads of argument the appellant had intimated that he no longer persisted with the argument that a jurisdictional attachment was necessary to confer jurisdiction on the court a quo; consequently the appeal was confined to the interdict granted in paragraph 2 of the order of Goldstein J, which related to the accumulated funds then in the bank account; the funds had since been transferred out of the country and the guarantee providing security de restituendo had lapsed; accordingly, if

the appeal was upheld no order could be made which would have any practical effect or result.

In seeking to counter this Mr Lazarus, for the appellant, in argument before us, was obliged to depart from the attitude which he had taken up in his heads of argument. He contended that the question of attachment remained relevant to the issue of jurisdiction and the outcome of the appeal, despite the absence of any funds or a valid guarantee. He sought thereby to shift the focus from paragraph 2 of the rule nisi to paragraph 1. He claimed that if successful on appeal the appellant would be entitled to a form of declaratory order which he formulated, inter alia, in the following terms:

> "1. The court a quo erred in discharging the rule issued on 7 February 1996 insofar as the order in paragraph 1 of the rule is concerned.

2. The court a quo has jurisdiction to adjudicate the action intended to be instituted by the appellant against the second respondent as referred to in paragraph 1 of the rule nisi."

An order in those terms, so the argument went, was one which would have a practical effect. He conceded that as matters stand at present he could not ask for confirmation of paragraph 2 of the rule nisi. The position might be different if an appeal against Nugent J's refusal to order fresh security were successful.

In the circumstances it became necessary to hear full argument on the merits of the appeal. Because, for reasons that follow, I am firmly of the view that the appeal on the merits cannot succeed, it is unnecessary to consider whether this would otherwise have been an appropriate matter in which to invoke the provisions of sec 21 A(l) of the Supreme Court Act.

Before passing on to the merits, a word about the section. It was inserted in the Supreme Court Act in 1993 but amended with effect from 14 February 1997. Both Mr Lazarus and Mr Duke, who appeared for ING Aviation, accepted that the amendment applied to all appeals heard after that date, even if the judgment or order appealed against had been given or made before then. This Court assumed that to be so in Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdale Stadsraad 1998(2) SA 1136 (SCA) at 1143 A - C (see also Western Cape Education Department and Another v George 1998(3) SA 77 (SCA) at 84 G). However, in MV Snow Delta, Discount Tonnage Ltd v Serva Ship Ltd 1998(3) SA 636 (C) at 646 B - C Thring J stated:

> "In passing, I point out that it was common cause between counsel that s 21 A of the Supreme Court Act 59 of 1959, which gives the Court a discretion to dismiss an appeal when 'the judgment or order sought will have no practical

> effect or result' and which might have had a bearing on this point, is not applicable in this case as it was inserted into the Supreme Court Act with effect only from 14 February 1997, after the order of the Court a quo had been made."

The view expressed by the learned judge is open to doubt. Sec 21 A(l) was designed to alleviate the pressure on, and reduce the workload of, courts of appeal generally, and this Court in particular (see Premier, Mpumalanga, en 'n Ander v Groblersdalse Stadsraad at the passage quoted above). That being so it strikes me as being a procedural provision rather than a matter of substantive law. If it were procedural it would normally apply from the date it came into operation in respect of both pending and prospective appeals (Steyn: Die Uitleg van Wette: 5th Ed, p 90). However, as the matter was not fully argued before us I refrain from expressing a firm view in regard thereto.

The appellant's application in the court a quo was based on two

grounds:

1.9 An assignment by Air Operations of its rights and obligations in terms of the agreement to ING Aviation, thereby rendering ING Aviation liable to Logans for any damages arising from breaches of the agreement; and

1.10 An oral agreement between Logans, Air Operations and ING Aviation in which it was agreed that, pending the determination of various disputes which had arisen during the currency of the agreement, neither Air Operations nor ING Aviation would be entitled to draw on the monies standing to the credit of the bank account. (As Air Operations makes no claim to the monies the issue is now confined to whether ING Aviation agreed that it would not be entitled to do so.)

I shall deal with each of these in turn.

The agreement

As I have already mentioned, the agreement was entered into between Logans and Air Operations, and Logans was required to open an irrevocable letter of credit in favour of Air Operations in order to ensure payment in terms of the agreement. The manner of payment was set out in clause 6(d) of the agreement, the relevant portion of which provides:

> "Air Ops will be able to draw against any L/C it holds on a weekly basis seven days prior to each flight, for the amount of the flight in accordance with a) above. Should Air Ops not deliver any flight in accordance with this contract, then they shall not be entitled to draw any funds for the next flight until they have satisfactorily delivered the previous flight. . . .
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> Should Air Ops draw the first payment from any L/C and not deliver the first flight as per the contract, Air Ops

undertakes to reimburse the full amount to Logans within 7 (seven) days.

. . . should Air Ops receive any payment, or draw on any L/C from Logans and not deliver as per this contract, Air Ops undertakes to reimburse the full amount to Logans within 7 (seven) days."

In terms of clause 14 of the agreement:

"Neither Air Ops nor Logans may without the prior consent of the other party assign this Agreement in whole or in part or delegate any of the agreed rights and obligations under this Agreement provided, however, that Air Ops has the right to assign this Agreement in whole or in part to ING Aviation Lease, Amsterdam, The Netherlands. Equally, Logans carries the same right of assignment to a Company still to be formed under the control of Logans."

The appellant alleged in his founding affidavit that, as

contemplated in clause 14, Air Operations assigned its rights and

obligations under the agreement to ING Aviation. This was denied by

ING Aviation. It claimed that all that had occurred was that Air

Operations, with Logans's consent, had transferred to it the right to

receive payment from Logans, without the transferral of any corresponding obligations. The appellant's proposed action for damages against ING Aviation proceeds on the premise that ING Aviation, by virtue of the assignment, is legally liable for all damages suffered by Logans on account of any breach of the provisions of the agreement.

It is not clear, either from the agreement itself or the record as a whole, where the agreement was concluded. I shall assume that it was outside the jurisdiction of the court a quo and that the court was not otherwise possessed of jurisdiction. As Logans was an incola of the court and ING Aviation a foreign peregrinus, attachment of the monies in the bank account (which belonged to ING Aviation) was necessary to found jurisdiction (ad fundandam juridictionem) i.e. to confer a

jurisdiction which did not otherwise exist. All that remained for the appellant to establish was that he had a prima facie cause of action against TNG Aviation. The requirement of prima facie cause of action is satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action. The mere fact that such evidence is contradicted will not disentitle the applicant to relief- not even if the probabilities are against him. It is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. (MT TIGR: Owners of the MT Tigr and Another v Transnet Ltd t/a former 1998(3) SA 861 (SCA) at 868 B - H). The remedy of attachment ad fundandam jurisdictionem in order to create jurisdiction is an exceptional remedy and one that should be applied with care and caution (Ex parte Acrow Engineers (Pty) Ltd 1953(2) SA 319

(T) at 2121 G - H; Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969(2) SA 295 (A) at 302 C - D). But once all the requirements for attachment have been satisfied a court has no discretion to refuse an attachment (Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd 1990(2) SA 90(5 (A) at 914 E - G).

Insofar as the appellant also sought an interim interdict pendente lite it was incumbent upon him to establish, as one of the requirements for the relief sought, a prima facie right, even though open to some doubt (Webster v Mitchell 1948(1) SA 1186 (W) at 1189). The accepted test for prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those

facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant he cannot succeed. (Gool v Minister of Justice and Another 1955(2) SA 682 (C) at 688 B - F and the numerous cases that have followed it).

The word "assignment" in our law is generally used to denote a transfer of both rights and obligations, but its precise meaning in a given case may depend upon the context in which it is used. Had clause 14 of the agreement simply spoken of "the right to assign" without qualification it may well be that any assignment pursuant thereto would encompass a transfer of both rights and obligations. But the right to assign was qualified by the words "in whole or in part". Mr Lazarus conceded that notionally this could permit of a transfer by Air

Operations to ING Aviation of the right to receive payment from Logans

under the agreement without a concomitant transfer of obligations.

It does not follow as a matter of law that because the right to receive payments from Logans was admittedly transferred by Air Operations to ING Aviation, the latter succeeded to the obligation to reimburse Logans in terms of clause 6(d) of the agreement if flights were not delivered. I agree with the learned judge a quo that the question of whether ING Aviation acquired that obligation would be one of fact dependent upon what arrangements were made between Air Operations and ING Aviation pursuant to clause 14. There is simply no evidence of an arrangement whereby ING Aviation undertook to reimburse Logans.

The appellant's case boils down to a bald allegation that the

obligations of Air Operations were transferred to ING Aviation. There is not a shred of evidence to support it. It amounts to a speculative conclusion rather than a statement of fact. There is nothing to show that ING Aviation ever acted in substitution for Air Operations in respect of the latter's obligations in terms of the agreement. In a matter such as the present, a bald assertion as to a state of affairs by a litigant having no personal knowledge of the relevant facts cannot, without more, establish a prima facie case. The fact that two of appellant's deponents, Mr Loubser and Mr Gain, purport to confirm the appellant's allegation does not assist the appellant as they, too, cannot speak from personal knowledge.

It appears from the record, and is not disputed, that a letter was written by Mr Richard Gain on behalf of Logans in March 1994 in which

it was said, inter alia,

> "As per the agreement, in order to open the letter of credit in favour of ING Bank, I require a letter from Air Ops assigning these rights over to ING. Please arrange for Thomas to fax me this today."

A letter of assignment was duly furnished in which it was provided that "Air Operations hereby assigns to

> ING Aviation Lease, Amsterdam, the right to be the beneficiary of the Irrevocable Letters of Credit issued by Logans".

No reference was made, either then or later, to the transfer of any

accompanying obligation. Regard may be had to these undisputed facts

which tend to negate the existence of prima facie cause of action.

> Insofar as inherent probabilities may additionally be taken into

account in relation to whether prima facie case for an interim interdict

was established, it is extremely unlikely that ING Aviation would have

agreed to take over the obligations of Air Operations in terms of the

agreement as, in the words of the judge a quo, "it would be most surprising if a financier had accepted the obligation to supply, maintain and equip aircraft and make all the arrangements necessary for international flights".

Consequently, in relation to the assignment issue, the appellant in my view failed to make out prima facie cause of action entitling him to either an attachment to found jurisdiction or an interim interdict. The oral agreement

The appellant alleged that during the currency of the agreement numerous disputes arose between Logans on the one hand, and Air Operations and ING Aviation on the other. Attempts to resolve these disputes were unsuccessful. The appellant claimed that this led to an oral agreement being reached at a meeting between Mr Loubser

(representing Logans) and Mr Eikelaar (a vice-president of ING Aviation representing both it and Air Operations) in Johannesburg in March 1995 that, pending resolution of the disputes, neither Air Operations nor ING Aviation would be entitled to draw on the monies standing to the credit of ING Aviation in the bank account. This agreement was later confirmed during April 1995 in the Maldives. The existence of any such oral agreement was denied by both Air Operations and ING Aviation.

On the appellant's version the oral agreement relied upon was entered into within the court a quo's area of jurisdiction. The bank account in which the monies were held was also situated within its jurisdiction. The court a quo was accordingly clothed with jurisdiction to entertain a dispute concerning the alleged oral agreement.

Attachment to found jurisdiction was neither necessary nor permissible.

Was the appellant entitled to an attachment to confirm jurisdiction (ad confirmandam jurisdictionem) i.e. to strengthen an existing ground of jurisdiction? In my view not. It appears to be generally accepted that the principle of effectiveness underlies the rule relating to attachment. Historically one of the underlying reasons for the attachment of property to found (or confirm) jurisdiction was to give effect to a judgment and provide an incola with security in advance for execution on that property after judgment. (Jackaman and Others v Arkell 1953(3) SA 31 (T) at 34 H; Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd (supra) at 306 H - 307 A). This principle, in the course of time, has become considerably eroded by permitting, in cases sounding in money, the attachment of articles of little value bearing no correlation to the

amount of the judgment sought. Having regard to the origin and purpose of attachment it is only justified (to confirm jurisdiction) in cases sounding in money or claims relating to property i.e. claims involving property or real rights to or in property. It would not have application to matrimonial causes or actions in personam which do not have a monetary or property component (see generally Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa: 4th Ed, pp 56, 60, 62; Erasmus: Superior Court Practice: A1 - 29; Pollak on Jurisdiction: 2nd Ed, pp 544, 82). The present matter falls into the latter category. The appellant seeks to establish the existence of an oral agreement precluding the withdrawal of money from a bank account - money to which it has no claim. The judgment sought is not one sounding in money in the sense in which that term is usually understood

nor is it one relating to property in respect of which the appellant claims a right. The requirements for an attachment to confirm jurisdiction are therefore not present.

It was argued that an order for costs is one sounding in money, and attachment is therefore required to confirm jurisdiction in respect of such an order. This argument was based in part on a judgment I gave some years ago in Mali v Mali 1982(4) SA 569 (SE) in which I followed dicta to that effect in Wells v Dean-Wilcocks 1924 CPD 89 at 93 and Kibe v Mphoko and Another 1958(1) SA 364 (O). I held (at 570 H) that there appeared to be no logical reason why the principle of effectiveness should not also extend to an order for costs, and concluded that no order for costs against a peregrine respondent can be effective without prior attachment, and that without such attachment no order for costs would

be appropriate.

What the decision overlooks is the essentially ancillary or consequential nature of an order for costs. Where a court has jurisdiction in a matter involving a peregrine respondent that does not sound in money or relate to property, and no attachment to confirm jurisdiction would be permissible, it would be entitled, because of the consequential nature of the order, and because of circumstances of convenience and common sense, to make an award of costs despite there having been no attachment (cf Sonia (Pty) Ltd v Wheeler 1958(1) SA 555 (A) at 564 A - D). This can also be seen as an application or logical extension of the causae continentiae principle (see Pollak, op cit, at 180). To hold otherwise would subvert the basic principle that attachment is only justified and permitted in cases sounding in money or

relating to property. There are potentially many cases involving peregrine respondents that do not fall into that category. Costs are a component of virtually all forms of litigation, and to permit an attachment in relation to a prospective costs order would be to allow an attachment to confirm jurisdiction in practically every case against a peregrinus. I do not believe the law permits that, or should permit it. I must therefore conclude (with due contrition) that I was wrong in refusing an order for costs in Malis v Mali (supra). In the result the appellant was not entitled to an order for attachment.

There remains the issue of the interdict pendente lite which was refused by Nugent J. He found that the appellant had established a prima facie right, but denied relief on the ground that the balance of convenience favoured ING Aviation. In this respect Nugent J expressed

himself as follows:

> "In my view, the balance of convenience clearly favours ING Aviation. No purpose at all is served by compelling it to retain the monies in the account, or even in this country. The applicant has no claim to the monies, nor has it demonstrated that it has any cause of action against ING Aviation. Indeed, on the evidence before me it is doubtful that a court would order specific performance of the alleged agreement.
>
> The applicant's counsel submitted that in the course of resolving the disputes with Air Operations a good claim against ING Aviation may emerge. That is pure speculation and, in my view, insufficient grounds upon which to deprive ING Aviation of the use of its money. Accordingly, in my view, the applicant's claim to an interdict must fail."

I agree. A further factor favouring ING Aviation at the time would have

been the potential weakening of the rand against other major currencies

resulting in a steady decline in the value of the money, destined

ultimately to leave the country, in the bank account. This contention

was advanced and substantiated on the papers. There is no basis for interfering with the discretion exercised by Nugent J in this regard. It follows that the appellant also fails in respect of the relief sought relating to the alleged oral agreement.

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

J W SMALBERGER
JUDGE OF APPEAL

HOWIE, JA)concur
PLEWMAN, JA)
STREICHER,JA) NGOEPE,
AJA)