REPORTABLE

Case Nos: 613/98

614/98
In the matter between:

FRANK ALBERT WILLIAM PURSER
Appellant

and

ALAN EDWARD SALES
Respondent

FRANK ALBERT WILLIAM PURSER
1st Appellant
JEANNE PATRICIA PURSER
2nd Appellant

and

ALAN EDWARD SALES
1st Respondent
SANDRA JACOUELINE SALES
2nd Respondent

Coram: HEFER ADCJ, MARAIS, ZULMAN JJA, MPATI AND MTHIYANE AJJA
Heard: 12 SEPTEMBER 2000
Delivered: 28 SEPTEMBER 2000

Practice - Judgments and Orders - Foreign judgments - Enforcement of - action defended - whether failure to object to jurisdiction amounts to submission thereto.

JUDGMENT

MPATI AJA:

[1] There are two appeals before us. In the first matter the respondent, a British national who resides in the United Kingdom caused a provisional sentence summons to be issued out of the Transvaal Provincial Division of the High Court, against the appellant for payment of the sum of £150 339,16, together with interest thereon calculated at the rate of 8% per annum from 3 February 1997 to date of payment. The action was based on a judgment obtained by the respondent against the appellant in the Central London County Court on 3 February 1997 for payment of the said sum and interest. In the second matter the respondent and his wife, as plaintiffs, issued a provisional sentence summons out of the same forum as in the first matter against the appellant and his wife, as defendants, for payment of a certain sum of money with interest. This action was based on a judgment obtained in the Central London County Court on 10 February 1997.

[2] Liability was denied in both matters. The bases for the denial are summarised in the judgment of the court *a quo* as follows:

> "It was common cause between the parties that the only issue which remained between [them] was whether the foreign court, i e the Central London County Court, was a court of competent jurisdiction. It was further common cause that the question of competency was dependant on the question whether there was a submission to the jurisdiction of the foreign court [by the appellant and his wife]."

[3] The court *a quo* (Van der Merwe J) held that the appellants had submitted to the jurisdiction of the foreign court and accordingly granted provisional sentence in both cases as prayed, but granted leave to appeal to this Court in each case.

[4] The legal point which came up for decision in both cases can be decided in the light of the facts of the first matter. That is how argument proceeded in the court *a quo* and in this Court as well. Briefly then, the facts

of the first matter:

[5] The respondent's claim against the appellant was based on an agreement entered into between the parties in England on 1 October 1987. The terms of the agreement are not relevant for present purposes, save that it made no provision for the jurisdiction of any particular forum in the event of a breach of its terms. The proceedings in the United Kingdom were commenced by way of a Writ of Summons with a Statement of Claim issued out of the Central Office of the High Court, Queen's Bench Division, on 27 January 1989. The process was subsequently served on the appellant in South Africa with leave of the English Court, whereafter, on 1 June 1989, an Acknowledgment of Service of the Writ of Summons was filed in the Queen's Bench Division on the appellant's behalf by his legal representative in the United Kingdom. On 2 June 1989 a Defence (plea) was filed on his behalf.

[6] The matter then took its course and after exchange of various documents and applications launched by each party against the other, including an application by the appellant to have the respondent's claim struck out "for want of prosecution", it was transferred, by consent, to the Central London County Court on 27 January 1997. This was to facilitate a consolidation of the two matters since the second matter had already been transferred to that court from the Chancery Division of the High Court.

[7] The matter was then set down for trial on 3 February 1997. There was no appearance on behalf of the appellant on the date of trial and after the evidence of the respondent had been led, judgment by default was entered against the appellant in the sum claimed in the provisional sentence summons.

[8] The appellant's case is that on 27 January 1989, which is the date on which the proceedings were commenced in the Queen's Bench Division, he and his wife had ceased to be resident in the United Kingdom and had taken up permanent residence in the Republic of South Africa. They had arrived in this

country during 1988. They purchased immovable property in Kempton Park, near Johannesburg and took occupation in January 1989. These allegations are indeed not in dispute and this was the reason why the respondents sought and obtained leave from the Queen's Bench Division to serve process in South Africa. On the basis of a change of domicile from the United Kingdom to the Republic of South Africa at the time the proceedings were launched, the appellant denies in his affidavit, filed in opposition to the provisional sentence summons, that the Queen's Bench Division, "alternatively the Central London County Court was a court of competent jurisdiction". The appellant alleges further that the fact that the agreement, which formed the basis of the respondent's claim, was entered into in England did not confer jurisdiction over him.

[9] It is not in dispute that in terms of English Law the Queen's Bench Division and the Central London County Court had jurisdiction to adjudicate over the matter. In an opinion dated 9 April 1998 and annexed to the appellant's affidavit, Steven Berry, a barrister and member of the Middle Temple, sets out the legal position as follows:

> "Under English procedure applicable in 1989 [when the Writ of Summons was issued], and indeed today in cases not involving Defendants domiciled in the European Community, the English Courts were permitted by the English Rules of the Supreme Court to take jurisdiction, in cases where a Defendant was resident in a foreign jurisdiction, such as the Republic of South Africa, in the circumstances set out in Order 11 Rule 1 of the Rules of the Supreme Court. The circumstances in Order 11 include the following:
>
> '*1. ... service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ:*
>
> *(a) relief is sought against a person domiciled within the jurisdiction ...*
>
> *(b) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of a breach of contract, being (in either case) a contract which -*
>
> *(i) was made within the jurisdiction ...'*
>
> The procedure is that a Plaintiff wishing to sue a Defendant resident in a foreign jurisdiction must apply *ex parte* to the court on the basis of an affidavit setting out facts which establish a good arguable case that the action is within Order 11: see Order 11 Rule 4(1). He must

also show that the case is a proper one for service out: see Order 11 Rule 4(2). In order to show that the case is a proper one for service out the Plaintiff must show that England is clearly the most convenient forum for trial of the issues arising in the action."

[10] It is common cause that the agreement between the parties, which formed the basis of the respondent's claim against the appellant, was concluded within the jurisdiction of the English Courts. It is also common cause that the respondent obtained leave to serve the process commencing action "in a foreign jurisdiction" and had thus succeeded in persuading the Queen's Bench Division, albeit *ex parte*, that England was "clearly the most convenient forum for trial of the issues arising in the action". The Queen's Bench Division thus had jurisdiction over the matter in terms of the laws of England and Wales.

[11] However, as was said in *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (T), the fact that the English Court had jurisdiction in terms of its own laws does not entitle its judgment to be recognised and enforced in this country. (At 1037H). Corbett CJ puts the position thus in *Jones v Krok* 1995 (1) SA 677 (A) at 685B-E:

"As is explained in Joubert (ed) *The Law of South Africa* vol 2 (first reissue) para 476, the present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence'); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign

> State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Business Act 99 of 1978, as amended. (See, generally, *Law of South Africa* (*op cit* vol 2 (first reissue) paras 477 and 478); Forsyth *Private International Law* 2nd ed at 336 *et seq* and the authorities cited.) Apart from this, our Courts will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law (*Joffe v Salmon* 1904 TS 317 at 319; *Law of South Africa* (*op cit* vol 2 (first reissue) para 476))."

Numbered points (iv), (v) and (vi) of this quotation are of no relevance *in casu.* Nor is (iii) since it was never suggested on behalf of the appellant that enforcement of the judgment of the English Court in this matter would be contrary to public policy. As to (ii) a certificate issued by a District Judge of the Central London County Court on 10 July 1997 and annexed to the provisional sentence summons confirms that "the time for appealing against the said Judgment has expired and no stay of the said Judgment is enforced". The judgment in issue is therefore final and conclusive in its effect. It was not suggested that it has become superannuated. The only requirement, or absence thereof, on which the appellant relies to avoid enforcement of the judgment in this country is (i) mentioned by Corbett CJ.

[12] The principles recognised by our law with reference to the jurisdiction of foreign courts for the enforcement of judgments sounding in money are:

1. at the time of the commencement of the proceedings the defendant (appellant in this case) must have been domiciled or resident within the state in which the foreign court exercised jurisdiction; or
2. the defendant must have submitted to the jurisdiction of the foreign court.

See *Pollak on Jurisdiction* 2nd ed (by Pistorius) at 162; Joubert *The Law of South Africa* vol 2 (1st reissue) par 478.

[13] That the appellant was not domiciled or resident in the United Kingdom at the time of the commencement of the proceedings is common cause. What remains to be decided then is whether the appellant submitted to the jurisdiction of the English Court. In *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another* 1986 (4) SA 329 (D) at 333E-G, Van Heerden J said:

> "Submission to the jurisdiction of a court is a wide concept and may be expressed in words or come about by agreement between the parties. *Voet* 2.1.18. It may arise through unilateral conduct following upon citation before a court which would ordinarily not be competent to give judgment against that particular defendant. *Voet* 2.1.20. Thus where a person not otherwise subject to the jurisdiction of a court submits himself by positive act or negatively by not objecting to the [jurisdiction] of that court, he may, in cases such as actions sounding in money, confer jurisdiction on that court. Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 30; Pollak *The South African Law of Jurisdiction* at 84 *et seq.*"

See also *Du Preez v Phillip-King* 1963 (1) SA 801 (W) at 803A.

[14] It is common cause, *in casu,* that the appellant never raised any objection to the jurisdiction of the English Court. Instead he filed a plea on the merits. When the respondent applied for the removal or transfer of the matter from the Queen's Bench Division to the Central London County Court the appellant moved for the striking out of the respondent's claim "for want of prosecution". The appellant thus participated fully in the proceedings.

[15] Mr South, for the respondent, submitted that where a defendant does not object to the jurisdiction of a court prior to *litis contestatio* he is deemed, as a matter of law, to have consented to the jurisdiction of that court; and that failure by the appellant to object to the jurisdiction of the English Court amounted to a tacit extension of the jurisdiction of that court. According to the affidavit of Alexandra Anne Adam, an English solicitor, pleadings in the matter were deemed to be closed at the expiration of a period of fourteen days after service of the appellant's Defence. Pleadings were accordingly deemed to have been closed on 16 June 1989.

[16] In *Lubbe v Bosman* 1948 (3) SA 909 (O) Van den Heever JP said at 914, with reference to certain old authorities:

> "It was a general principle of the common law that where a defendant without having excepted to the jurisdiction, joins issue with a plaintiff in a Court which has material jurisdiction, but has no jurisdiction over defendant because he resides outside the jurisdiction of that Court, the defendant is deemed to have waived his objection and so as it were conferred jurisdiction upon the Court."

See also *William Spilhaus & Co (M.B.) (Pty) Ltd v Marx* 1963 (4) SA 994 (C) at 996G, where reference is made to *Voet* 2.1.20 and other Roman Dutch authorities.

[17] *Voet*, at 2.1.18 asserts that "once *litis contestatio* has taken place the jurisdiction of him before whom the proceeding was in this way started can no longer be declined by one of the litigants". And further that an objection to jurisdiction "must be put forward before *litis contestatio* at the origin and among the very preliminaries of the suit". (Gane's translation). It does not matter, says *Voet*, at 2.1.19 (Gane's translation) whether or not *litis contestatio* took place in error (of either party) the result is the same.

[18] I find myself in respectful agreement with Theron J when he says in the *William Spilhaus* case, *supra*:

> "... I can see no reason for thinking that our Courts in general would fail to give effect to the rule of the common law as it is to be gathered from *Voet*, 2.1.20, as read with 2.1.18, 26 and 27, that a defendant who has pleaded to the plaintiff's main claim without objecting to the jurisdiction must, at any rate after the stage of *litis contestatio* has been reached, be considered to have bound himself

irrevocably to accept the jurisdiction of the court - and this even in a case where his failure to raise the question of the jurisdiction might have been due to some mistake on his part." (1001H-1002A).

[19 But Mr Medalie for the appellant, relying on *Du Preez v Phillip-King*, *supra*, at 803A-G, submitted that submission to jurisdiction by conduct being essentially a question of unilateral waiver, acquiescence or election, no such waiver, acquiescence or election can be inferred from the appellant's conduct in this matter. The appellant says the following in his affidavit:

"5. On receipt of the summons I telephoned a firm of solicitors in London, namely Roche Hardcastles. I was referred to a partner of that firm, one Frank Riley ("Riley") and informed him of the details contained in the summons.

6. I raised my concern with Riley that I would not be in a position to properly defend an action in the United Kingdom whilst residing permanently in South Africa. I was not informed by him that there were any legal procedures available to me to overcome this difficulty and was informed by him that unless I filed an acknowledgment of service and a defence to the summons, judgment would be obtained against me within a short period of time and that execution would follow.

7. In the light of the legal advice given to me, I provided Riley with details of my defence which was then apparently filed on my behalf on 16 May 1989. As appears from pages 4 to 5 of Annexure "AES1" I did not sign the defence and had no knowledge of the legal implications thereof insofar as jurisdiction is concerned.

8. I was certainly not informed of the fact that in terms of the Rules of Court in the United Kingdom, and more particularly

Order 12 Rule 8(1), I was entitled to object to the jurisdiction of the Court by virtue of my residence outside the United Kingdom.

9. I am now advised that the probable reason for Riley's failure to inform me of the procedures set out in par 8 above, is the fact that it would have been hopeless for me to attempt to dispute jurisdiction by issue of an Order 12 Rule 8 summons, asserting that the case was not a proper one for service out of the jurisdiction. In this respect, I annex hereto marked Annexure "A", an opinion obtained from one Steven Berry ("Berry"), a barrister and member of the Middle Temple and Lincoln's Inn presently practising from Essex Court Chambers, London."

[20] In his opinion Berry argues that because the English Court had jurisdiction, in terms of its own laws, it would have been hopeless to challenge its jurisdiction notwithstanding the fact that the appellant was resident in the Republic of South Africa at the time the proceedings were commenced. Basing his argument on the opinion of Berry, Mr Medalie submitted that there could be no talk of the appellant having waived his right to object to the jurisdiction of the English Court because that court did in fact have material jurisdiction over the matter. The appellant therefore had no right to object to the court's jurisdiction. Absent a right to object, no question of a waiver of that right could arise. He had no choice but to defend the action. This submission is of course fallacious. The appellant indeed had a right to object to the English

Court's jurisdiction. Whether he would have succeeded is another matter. He realised from the outset that he "would not be in a position to properly defend an action in the United kingdom whilst residing permanently in South Africa". He raised his concern with his solicitor, Riley.

[21] Berry says this in his opinion:

> "If an order granting leave is made *ex parte* on the basis of the *ex parte* affidavit, it is open for a Defendant who has been served with a writ out of the jurisdiction to challenge jurisdiction by applying to have the order set aside under Order 12 Rule 8. He may do so either on the grounds that there is no good arguable case that the action is within Order 11 or that, even if it is within Order 11, England is not clearly the most convenient forum for trial of the issues in the action."

It was thus open for the appellant to raise an objection to the jurisdiction on grounds of *forum non conveniens*. The failure of his legal representative to inform him that he was entitled to object to the jurisdiction of the English Court by virtue of his residence outside the United Kingdom is, in my view, no answer to the respondent's case that the appellant submitted to the jurisdiction of the English Court.

[22] It is in any event clear from paragraph 6 of his affidavit quoted above that, by defending the action, the appellant wished to avoid execution against assets which he still had in the United Kingdom. He wanted to protect such assets and, judging from his plea, thought that he had a good defence to meet the appellant's claim. He participated fully in the proceedings and having failed in his defence cannot now be heard to say that he participated only so as to protect his assets in the United Kingdom. A defendant who raises no objection to a court's jurisdiction and asks it to dismiss on its merits a claim brought against him is invoking the jurisdiction of that court just as surely as the

plaintiff invoked it when he instituted the claim. Such a defendant does so in order to defeat the plaintiff's claim in a way which will be decisive and will render him immune from any subsequent attempt to assert the claim. Should he succeed in his defence, the doctrine of *res judicata* will afford him that protection. Should his defence fail, he cannot repudiate the jurisdiction of the very court which he asked to uphold it. In my view, the facts point overwhelmingly to the appellant having submitted to the jurisdiction of the English Court.

The appeal is dismissed with costs.

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L MPATI
ACTING JUDGE OF APPEAL

AGREE:

HEFER ADCJ
MARAIS JA
ZULMAN JA
MTHIYANE AJA