# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 79/05
REPORTABLE

In the matter between:

**ROBERT HSU-NAN TSUNG** **FIRST APPELLANT**

**ROBERT CHENG-LI TSUNG** **SECOND APPELLANT**

**and**

**INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED** **FIRST RESPONDENT**

**FINDEVCO (PTY) LTD** **SECOND RESPONDENT**

Coram: Harms, Farlam, Cameron, Jafta and Cachalia AJA

Heard: 10 March 2006

Delivered: 23 March 2006

Summary: Attachment to found or confirm jurisdiction – consent to jurisdiction – after attachment – cannot undo attachment.

**Neutral citation:** ***Tsung v Industrial Development Corp of SA Ltd*** **[2006] SCA 27 (RSA).**

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# JUDGMENT

**HARMS JA:**

[1] This appeal raises the crisp question whether a peregrine defendant, by consenting belatedly to the local court's jurisdiction, can undo an attachment founding or confirming jurisdiction. Alleging that they have a claim of some R40m against the appellants in terms of s 424 of the Companies Act 61 of 1973 for fraudulently or recklessly running a local company the respondents, who are *incolae* (resident locally), sought and obtained ex parte an order for the attachment of certain immovable properties and shares belonging to the appellants in the Cape High Court. The appellants, who are resident in Hong Kong, are *peregrini*, not only of that court but also of the Republic. They became aware of respondents' intention to attach and the existence of the order only after the actual attachment. On the return day they opposed the finalisation of the order on the ground that, had they known of the intended proceedings, they would have consented to jurisdiction and, in any event, since the attachment they have in fact so consented unconditionally. They did not contend that the respondents were not otherwise entitled to the order sought. Traverso DJP held that this consent was too late and could not undo the attachment, and she issued a final order. Against this the appellants appeal with the High Court's leave.

[2] In order to avoid confusion it should be pointed out at the outset that what is said in this judgment is intended to apply to those cases where the plaintiff (or applicant) is an *incola* and the defendant (or respondent) is a foreign *peregrinus*, ie, someone who is a *peregrinus* of the Republic, and the claim is one sounding in money. The arrest or attachment of goods of a local *peregrinus* (ie, someone who is an *incola* of the country but not of the particular court) to found or confirm jurisdiction is by statute not permitted.[1]

[1] E.g Supreme Court Act 59 of 1959 s 28.

[3] In the present context the difference between an arrest or attachment *ad fundandam jurisdictionem* and one *ad confirmandam jurisdictionem* is of no consequence.[2] The reason is that if the defendant is a *peregrinus* and whether or not the court has jurisdiction over the cause, eg, because the cause of action arose within the jurisdiction or jurisdiction exists *ratione delictus* or *ratione contractus*, an attachment or arrest is essential for the exercise of jurisdiction: 'a recognised *ratio jurisdictionis* by itself will not do'.[3] With 'jurisdiction' is meant the power to adjudicate upon a particular case and to give effect to the judgment.[4]

[4] The practice of arrest or attachment to found or confirm jurisdiction was firmly established in Holland by the 17th Century in the interest of *incolae* and from considerations of commercial convenience. It enabled them to proceed in local courts against *peregrini* who were for the time being physically within the jurisdiction area of the court or possessed property there.[5] In addition to founding or confirming jurisdiction and to commence proceedings, an attachment had since those days an additional function and that was the provision of security enabling the plaintiff, eventually, to execute in his own jurisdiction. Pending the finalisation of the proceedings, the defendant could not alienate or encumber the attached property.[6] This function of attachment has since repeatedly been highlighted by our courts, including by this Court some months ago.[7]

[5] The arrest of a *peregrinus*, it would appear, was used not only for founding or confirming jurisdiction but also to coerce the *peregrinus* to pay.[8] Today arrest

[2] *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) where a contrary view was held is to that extent wrong.
[3] *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) 258D-G; *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para 20.
[4] *Steytler NO v Fitzgerald* 1911 AD 295 346; *Hugo v Wessels* 1987 (3) SA 837 (A) 849H; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A) 886D-E.
[5] *Owners of SS Humber v Owners of SS Answald* 1912 AD 546 at 555; *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A) 918E-H, 920C-J.
[6] *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) 306D-H.
[7] *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para 26.
[8] JWW (Sir John Wessels) 'History of our law of arrest to found jurisdiction' (1907) 24 *SALJ* 390.

still serves to found or confirm jurisdiction but can, obviously, no longer serve as security for a debt and, at least in this regard, there is a difference between arrest and attachment. There are other aspects. As long as a century ago Van Zyl's *Judicial Practice*[9] recognised that an arrest 'affects the liberty of the subject'; and at present the arrest of a person has a constitutional dimension.[10]

[6] The rationale for jurisdiction is often said to be one of effectiveness, and attachment is historically and logically closely related to this principle; but not only has the principle of effectiveness been eroded[11] (Forsyth says 'it is artificial and conceptual rather than realistic'),[12] effectiveness is also not necessarily a criterion for the existence of jurisdiction.[13] In one instance effectiveness is non-existent and that is in the case of submission to jurisdiction (also referred to as prorogation). The reason is this: if a peregrine defendant has submitted – whether unilaterally or by agreement – to the jurisdiction of the court of the *incola*, an attachment or arrest to found or confirm jurisdiction is not only unnecessary, it is not permitted.[14] (Consent on its own cannot confer jurisdiction unless the plaintiff is an *incola*.)[15] There are good commercial reasons for this.[16]

'Foreigners who submit voluntarily to the jurisdiction of our Courts should not have to fear that thereafter they or their property are at any time and without notice subject to attachment whenever an *incola* can satisfy a Court that he has a *prima facie* case against them.'[17]

[9] CH van Zyl *The Theory of the Judicial Practice of the Colony of the Cape of Good Hope* 1 ed (1893) 121. The same statement appears in later editions of this work called *The Theory of the Judicial Practice of South Africa.*

[10] *Himelsein v Super Rich CC* 1998 (1) SA 929 (W).

[11] *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) 300G-H.

[12] *Private International Law* 4 ed 215 quoted in *Hay Management Consultants v P3 Management Consultants* 2005 (2) SA 522 (SCA) para 17.

[13] *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) 260B.

[14] *Hay Management Consultants v P3 Management Consultants* 2005 (2) SA 522 (SCA) para 24; *American Flag plc v Great African T-Shirt Corporation CC* 2000(1) SA 356 (W) 377F.

[15] *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A) 893; *Hay Management Consultants v P3 Management Consultants* 2005 (2) SA 522 (SCA) para 21.

[16] *Hay Management Consultants v P3 Management Consultants* 2005 (2) SA 522 (SCA) para 17.

[17] *Elscint (Pty) Ltd v Mobile Medical Scanners* 1986 (4) SA 552 (W) 558B.

In addition, the ensuing judgment will be internationally enforceable; will be recognised by the courts of the defendant's domicile; and binds the whole property of the defendant.[18] The downside is that the plaintiff will have to pursue the defendant in order to have the judgment enforced.[19]

[7] Applications for attachment or arrest are as a matter of course brought without notice and the plaintiff has, until submission, the right to apply for such an order and, if the requirements have been met, entitled to an order.[20] On the return day the court has to be satisfied that the applicant has a prima facie case;[21] and that, on a balance of probabilities the applicant is an *incola* and the respondent a *peregrinus* and the property sought to be attached is that of the respondent.[22] Whether submission is possible after the grant of the order but before the attachment, was the subject of *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) para 30 where this Court held that 'it is not too late for a submission to jurisdiction to be given before the attachment is put into effect.'[23]

[8] That brings me then to the issue in this case, namely whether an attachment can be undone by a late consent. The case law in this regard has a long lineage. The first case in this regard was *Ellerton Syndicate v Hutchings* (1893) 3 CTR 124. De Villiers CJ decided the point laconically, holding that the attachment served a double object namely to facilitate proceedings and to obtain security and 'if the law gave them [the *incolae*] that advantage, they were entitled to take it.'[24] Then there was *Bedeaux v McChesney* 1939 WLD 128 at 132 where Solomon J came to the same conclusion for the same reason. The issue was again raised before Berman AJ in *Kasimov v Kurland* 1987 (4) SA 76 (C) who

[18] *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) para 23-24.
[19] *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para 26.
[20] *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para 27 and 29.
[21] *Dabelstein v Lane and Fey NNO* 2001 (1) SA 1222 (SCA) para 7.
[22] *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A).
[23] See also *Utah International Inc v Honeth* 1987 (4) SA 145 (W); *Rosenberg v Mbanga (Azaminle Liquor (Pty) Ltd intervening)* 1992 (4) SA 331 (E).
[24] It would appear that a *peregrinus* cannot by returning to the country and becoming an *incola* undo the attachment: *Zakowski v Wolff* 1905 TS 32.

decided to follow *Bedeaux.* He added that *Bedeaux* had to be right (at 81A) –

'for otherwise every *peregrinus* whose property has been attached to confirm jurisdiction could voluntarily submit to the Court's jurisdiction, thereby ensuring the release of that property, and thus frustrate the *incola* from executing against the already attached property on obtaining a judgment in his favour. This would effectively do away with one of the objects of the attachment of the property of a *peregrinus*.'

The judgment in *Blue Continent Products (Pty) Ltd v Foroya Banki PF* 1993 (4) SA 563 (C) was to the same effect. Farlam AJ added another reason for the conclusion (at 574F-G):

'If a defendant only submits to the court's jurisdiction once his goods have been attached, there is the danger that a judgment thereafter given against him may not be recognised internationally because he may be able to contend in some other forum that his submission was not voluntary because it only took place after the arrest . . ..'

This judgment was followed in *Associated Marine Engineers (Pty) Ltd v Foroya Banki PF* 1994 (4) SA 676 (C) 690B-E.

[9] In *Bettencourt v Kom* 1994 (2) SA 513 (T) Hartzenberg J also held that a late consent cannot undo an attachment but added that the *peregrinus* who belatedly consents is not necessarily without redress. He said (at 517C-E):

'I consider myself not to be entitled to set aside the attachment which was validly made in this case. It is any event my view that the correct way to relieve the position of a defendant, who consents to jurisdiction after an attachment and who is inequitably extorted by the attachment, even if he has a good defence, is by an application, as was done in the case of *Banks v Henshaw* 1963 (3) SA 464 (D). In such an application a Court ought to be at large to look at all the circumstances of the case, such as the amount of the claim, the likelihood of the plaintiff succeeding, the financial position of the defendant, the ease or otherwise of executing on a judgment in the country of domicile of the defendant, the hardship to the defendant if the attachment remains and similar considerations. The Court can then decide if the attachment is to remain unaltered or if it is to be reduced, set aside, or substituted with some other form of

attachment or security.'

[10] There are two judgments that, on the face of it, are in conflict with the foregoing. Both dealt, however, with a submission by a *peregrinus* who had been arrested to found or confirm jurisdiction. Although the reasoning of the first, *Small Business Development Corporation v Amey* 1989 (4) SA 890 (W), is not easy to follow and while I disagree with the reasoning in the second, *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) I agree – for the reasons given by Cameron J in *Himelsein v Super Rich CC* 1998 (1) SA 929 (W) – that they were, on their facts, correctly decided. As I have mentioned, arrests differ from attachments in two material respects: since arrests do not provide security, generally there can be no justification for detaining a person who has consented to jurisdiction after arrest and, secondly, there is, as has been pointed out in *Himelsein* (at 936B-D) a constitutional aspect where arrest and physical detention are concerned.

[11] The appellants wish us to overrule this line of authority for two reasons. The first is to make a rule about late consent that is compatible with *Jamieson*; and the second is to make the rule fairer. The argument tends to lose sight of the fact that, in the main, the function of courts is to apply the law and not to make law. A long established practice, generally accepted and applied, should be followed[25] unless legally unwarranted and shown to have been wrong[26] or logically indefensible.[27] Obviously, if a rule of the common law is incompatible with constitutional values, courts have a constitutional duty to develop the common law to accord with those values but it has not been suggested that the rule in its present form is in this regard deficient. It has often been said that our law is a virile living system which has to adapt itself to deal with new challenges and changing conditions but such development must be consistent with the

[25] *Rainbow Diamonds (Edms) Bpk v SA Nasionale Lewensasuransiemaatskappy* 1984 (3) SA 1 (A) 14I.
[26] *Bydawell v Chapman NO* 1953 (3) SA 514 (A) 521C-E; *Du Plessis v Strauss* 1988 (2) SA 105 (A) 142E-H.
[27] *Ex parte Kaplan and others NNO: in re Robin Consolidated Industries Ltd* 1987 (3) SA 413 (W) 423A-D.

inherent basic principles of the law.[28] This enables higher courts after due reflection and on sound policy grounds to change the direction of the law[29] because 'the law must be sensitive to human development and social change'[30] and 'judges must necessarily look to the present and to the future as well as to the past.'[31] On the other hand, as Curlewis J once remarked,[32]

'commercial undertakings (and indeed the public generally) require certainty from our law rather than doctrinal purity or juristic rightness'.

The simple point is that the law is not seamless.

[12] The Constitutional Court, in a similar vein, said this:[33]

'In exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary. In this regard it is worth repeating the dictum of Iacobucci J in *R v Salituro [(1992) 8CRR (2d) 173, [1991] 3 SCR 654]*, which was cited by Kentridge AJ in *Du Plessis v De Klerk [1996 (3) SA 850 (CC) para 61]*:

"'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'"

[13] Reverting to the appellants' argument, I do not believe that the rule under consideration is incompatible with the rule in *Jamieson.* Prior to the actual attachment under the court order, the court has not yet jurisdiction in the cause, the litigation between the parties has not yet begun and, more importantly, the

[28] *Pearl Assurance Co Ltd v Government of the Union of SA* 1934 AD 560 (PC) 563; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) 220D-G.
[29] *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A) 332H-I.
[30] Lord Scarman in *Gillick v West Norfolk & Wisbeck Area Health Authority* [1986] 1 AC 112.
[31] Mc Hugh J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 216.
[32] *SA Permanent Building Society v Messenger of the Court, Pretoria* 1996 (1) SA 401 (T) 403C-D.
[33] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 36.

plaintiff holds no security. On attachment there is a dramatic shift because the court now has jurisdiction, the litigation has begun and, significantly, the plaintiff holds security. No policy reason has been proffered as to why the continued existence of such security should be subject to the defendant's whims. The reasons why it should not be so have already been given by the existing case law. As far as general fairness is concerned, a *peregrinus* who enters into a consensual arrangement with an *incola* can protect himself by, at that stage already, consenting to jurisdiction or, if he is not prepared to submit to a local court, by stipulating that the *incola* will not be entitled to attach his goods for jurisdictional purposes.[34] However, this is generally not possible where, as in this case, the cause of action is not based on a consensual arrangement but on a wrongful act. It does not appear to me fair to expect the *incola*, especially in those circumstances, to alert the *peregrinus* of his intentions and invite him to submit to the local jurisdiction and to place his possible security at risk. Money may leave the jurisdiction by the push of a button, shares can be disposed of by the flick of a switch and air tickets can be bought over the internet. In any event, the fairness argument was rejected for sound reason by Scott JA in *Naylor*[35] and it behoves me not to reopen the debate without good reason.

[13] The appeal stands to be dismissed with costs of two counsel and it is so ordered.

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**L T C HARMS**
**JUDGE OF APPEAL**

**CONCUR:**

**FARLAM JA**
**CAMERON JA**
**JAFTA JA**
**CACHALIA AJA**

[34] *Commissioner for Inland Revenue v Isaacs NO* 1960 (1) SA 126 (A) 132H-135A.
[35] *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para 29.