THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable
CASE NO 674/2005

In the matter between

MICHAEL RICHMAN Appellant

and

GERSHON BEN-TOVIM Respondent

Coram: Zulman, Cameron, Brand, Maya JJA and Theron AJA
Heard: 16 NOVEMBER 2006
Delivered: 29 NOVEMBER 2006

Summary: Enforcement and recognition of a foreign judgment- proper meaning to be given to the meaning of international jurisdiction or competence where a South African court called upon in provisional sentence proceedings to enforce default judgment of English court - where personal service of English writ on defendant whilst temporarily physically present in England - service acceptable to render the judgment 'internationally' competent in South Africa.

Neutral citation: This judgment may be referred to as *Richman v Ben-Tovim* [2006] SCA 148 (RSA)

JUDGMENT

ZULMAN JA

[1] The central issue in this appeal is whether an English court which granted a default judgment against the respondent (the defendant in the court *a quo*) who was physically present in England when the initiating process was served upon him had jurisdiction to entertain the matter according to principles recognised by South African law with reference to the jurisdiction of foreign courts.

[2] The default judgment was obtained in the High Court of Justice of England and Wales (Queens Bench Division) (the English court) for payment of £57 882.17 plus interest at eight per cent per annum and costs. The cause of action was for payment of legal services rendered and disbursements incurred by the appellant (plaintiff) on behalf of the defendant. Based on this judgment the plaintiff instituted action for provisional sentence in the Cape High Court for payment of the said sum, alternatively its rand equivalent; interest on the sum *a tempore morae* at 8 per cent per annum and costs. The court *a quo* (Van Zyl J) dismissed the plaintiff's action but granted leave to appeal to this court. The judgment is reported (2006 (2) SA 591 (C)).

[3] The respondent defended the action and raised a number of defences, all

but three of which were abandoned at the hearing. The three defences were that:

(i) The English Court lacked international jurisdiction or competence;

(ii) Enforcement of the judgment was precluded by the provisions of the Protection of Business Act 99 of 1978 as amended; and

(iii) Public policy precluded the appellant from recovering the fees and disbursements which formed the subject matter of the English judgment.

In upholding the defence set out in (i) the court *a quo* held that the defendant was neither domiciled nor resident in England at the time proceedings were instituted, which was common cause, but was only there for business reasons, making his presence temporary if not transient. A submission to jurisdiction of the English Court was the only other ground of international competence. The court *a* quo found there had been no such submission and the point is not pursued on appeal. The two further defences were accordingly not dealt with in the judgment. The plaintiff's case is predicated on the proposition that there is international competence in South African law if a defendant is merely physically present in the jurisdiction of the foreign court at the time action is instituted and process served and that in the present case the English Court was also the *locus contractus* as well as the *locus solutionis*.

[4] The question that obtrudes at the outset is why a party, armed with a final and conclusive judgment of an English court should not be entitled, prima facie

at least, if only on the grounds of comity between civilised nations and having regard to the current global environment, to relief in our Courts.[1]

[5] The position in South Africa regarding provisional sentence in respect of a foreign judgment, in so far relevant to the defences now raised, is described by Corbett CJ in *Jones v Krok*[2] in these terms:

> '…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');
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> …
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> (iii) that the recognition and enforcement of the judgment by our courts would not be contrary to public policy;
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> …
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> (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended.'

[6] The principle in (i) is of direct significance in this appeal – is mere

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[1]Cf the remarks of Corbett CJ in *Jones v Krok* 1995 (1) SA 677 (AD) at 692H-I. albeit it in a different context: 'The main reason for adopting these rules [in regard to the enforcement of a foreign judgment] is that they conform broadly to such authority as there is in our law and to the legal position in the vast majority of the foreign jurisdictions to which I have referred. As to the latter, it seems to me that there is merit in our legal system falling into line both from a practical point of view and in the general interests of comity. While the German approach has a certain logical appeal, it seems to me that there could be practical difficulties in implementing it and particularly in determining when a foreign judgment has become unassailable by ordinary remedies. Moreover, in my view, a party armed with an otherwise final and conclusive foreign judgment should be entitled, *prima facie*, to relief in our Courts.'

[2]Supra at 685B-D.

personal service of process on the respondent in London, where he was neither domiciled nor resident, sufficient to vest the English court with international jurisdiction in terms of our law? The requirement appears to telescope two components. First the principles of our law and second the jurisdiction of the foreign court according to its law. The second component is a matter of fact. In this latter regard the appellant relied upon the evidence of an English barrister practising commercial law at the English bar in which he stated, inter alia, citing *Dicey & Morris*,[3] that an English Court will have jurisdiction to entertain a claim *in personam* if the defendant, even if only temporarily present, is served with process in England. This fact was not disputed by the respondent. Van Zyl J was prepared to accept, for present purposes, that the English court had the requisite power or jurisdiction to grant judgment.[4]

[7] The fact that the English court had jurisdiction according to English law is not enough. The matter must also be decided according to the principles recognised by South African domestic law. Van Dijkhorst J put the matter as follows in *Reiss Engineering Co Ltd v Isamcor (Pty) Ltd*:

'The fact that the English Court may have had jurisdiction in terms of its own law does not entitle its judgment to be recognised and enforced in South Africa. It must have had jurisdiction according to the principles recognised by our law with reference to the jurisdiction of foreign courts.

[3]'*The Conflict of Laws'* Vol 1 (13th ed) Rule 22 – paragraph 11R-001.
[4]See also *Cheshire and North's Private International Law* (13th ed) pages 286-287.
1983 (1) SA 1033 (W) at 1037G-H.

The South African conflict of law rules relevant to the present action are clear. I quote from *Pollak* (*The South African Law of Jurisdiction* 1937 at 219) [the first edition of *Pollak]*:

"A foreign court has jurisdiction to entertain an action for a judgment sounding in money against a defendant who is a natural person in the following cases:

1. If at the time of the commencement of the action the defendant is physically present within the state to which the court belongs;

2. If at the time of the commencement of the action the defendant, although not physically present within such state, is either (a) domiciled, or (b) resident within such state;

3. If the defendant has submitted to the jurisdiction of the court.

There are no other grounds for jurisdiction."'

This exposition of the law is supported by Spiro[5]. Joubert[6] does not express an opinion in respect of *Pollak's* first ground, stating that there has been no decision on the question whether mere temporary physical presence of a person who is neither resident nor domiciled will suffice Hahlo and Kahn[7] regard it as a 'possible' ground. The decision in *Reiss* was approved and applied, without controverting the relevant exposition, in cases such as *Jones v Krok,*[8] *Erskine v Chinatex Oriental Trading Co*[9] and *Blanchard, Krasner & French v Evans*[10]. Van Zyl J nevertheless considered himself bound by the following statement in *Purser v Sales; Purser and Another v Sales and Another*:

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[5]*Conflict of Laws* at 212-213.
[6]*Joubert The Law of South Africa (LAWSA) Vol 2 para 573.*
[7]*The Union of South Africa. The Development of its Laws and Constitution* at 756.
[8]Supra at 685G although not specifically on the point of mere physical presence as being a ground for international competence.
[9]2001 (1) SA 817(C) at 820J-821B.
[10]2001 (4) SA 86 (W) at 89H-90A.
2001 (3) SA 445 (SCA) para 12 at 450J-451B.

'[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 *Pollok on Jurisdiction* 2nd ed (by Pistorius) at 162; Joubert (ed) *The Law of South Africa* vol 2 1st reissue para 478.'

[8] The seeming suggestion in *Purser* that our law would recognise the jurisdiction of the foreign court if at the time of commencement of the proceedings the defendant was domiciled or resident within the State of the foreign court which exercised jurisdiction, or submitted, but not in cases of temporary presence, was plainly obiter. No mention was made of the first edition of *Pollak* or to Van Dijkhorst's endorsement of it in *Reiss*. The appellant in *Purser* had not been physically present in the foreign jurisdiction at the time when proceedings were instituted, service having been effected in South Africa with the leave of an English court. Mere presence in the foreign State, which is of prime importance in this matter, was not explored or even mentioned. The only issue argued was the factual question whether the defendant had submitted to the jurisdiction of the foreign court or not. Furthermore the reference in *Purser* to the exposition in the second edition of *Pollak on Jurisdiction* by

Pistorius[11] (which omitted temporary presence) was misconstrued by the court *a quo* as constituting deliberate approval of a change from the contrary statement in the first edition of *Pollak* referred to in *Reiss.* The learned author Pistorius[12] in the second edition of Pollak dealt only with domicile or residence in the foreign court at the time of the commencement of the proceedings and a submission to jurisdiction. In Joubert,[13] the second authority referred to in *Purser*, the following is stated (in the references given):[14]

'There has been no decision on the question whether the mere temporary physical presence of a person who is neither a resident nor a domiciliary will suffice.'

The footnote refers to an obiter dictum in the Rhodesian case of *Steinberg v Cosmopolitan National Bank of Chicago*[15] where Beadle CJ stated that in a case sounding in money, if a common law delict is committed within the jurisdiction of a foreign court and the defendant is within that jurisdiction and there served with process when the action commences, the judgment of the foreign court will be recognised in Rhodesia. Beadle CJ cited the first edition of *Pollak* at pages 38, 209, and 219, as also certain English textbooks, as authority for the proposition. Joubert also refers to Kahn[16] who comments on the *Steinberg* case and states that Walter Pollak in the first edition of his book supports the obiter view of Beadle CJ 'as being part of South African Law, or because of want of direct authority supporting it, at least as it ought to be.' MacDonald JA did not agree with

[11]At 162.
[12]At page 162.
[13] LAWSA Vol 1 1st reissue para 478 page 387.
[14]At p 391.
[15]1973 (4) SA 564 (RA) at 574E.
[16]1973 *Annual Survey* 436-437.

Beadle CJ's view. Lewis JA who also sat in the case pointed out that the decision makes new law and was not covered by any of the authorities to which the court was referred. Professor Kahn goes on to state:

'If personal service within the court's area is a ground of international jurisdiction in money proceedings in modern Roman Dutch law then with respect the judgment is to be welcomed. But is it a ground? True, the jurisdictional criteria of internal and international jurisdiction does not always coincide, although in principle, it is believed, they should. But normally where they do not the internal are the more extensive. Does it not sound strange that personal service within the area suffices abroad but not locally?'

It is perhaps of some significance that in South African domestic law, the drastic procedure of arrest to found jurisdiction (though constitutionally suspect) may be resorted to where a *peregrine* is temporarily within the jurisdiction of the court. Such a procedure is unknown in English Law where service is sufficient to confer jurisdiction. Joubert also refers to Van Dijkhorst J's judgment in *Reiss*[17] where the view of *Pollak* in the first edition of his work is endorsed. Forsyth[18] criticizes Steinberg's case and submits, without any authority, that mere presence is not a ground of international competence. He also makes the point that the dictum in *Purser* makes no mention of mere physical presence as a ground of international competence. The learned author refers to an obiter statement of Erasmus J in *Erskine*[19] to the effect that physical presence at the

[17]Supra at 1037H-1038B.
[18]*Private International Law* (4th ed) pages 401-402.
[19] Supra at 820J.

time of the institution of the action will suffice. Edwards[20] makes the point that there is no support either in authority or in principle for physical presence *per se* as grounding international competency. In *Supercat Incorporated v Two Oceans Marine CC*[21] (although decided after *Purser*) Conradie J made no mention of *Purser*. The learned judge observes that:

'Sometimes, it seems, our Courts recognize the jurisdiction of a foreign Court although they themselves would not have assumed jurisdiction on the same footing.'[22]

[9] There are compelling reasons why, as submitted by the plaintiff's counsel, in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen. In addition, it is now well established that the exigencies of international trade and commerce require '…that final foreign judgments be recognised as far as is reasonably possible in our courts, and that effect be given thereto.'[23] This court (albeit in a slightly different context) said in *Mayne v Main*[24] that a 'common-sense' and 'realistic approach' should be adopted in assessing jurisdictional requirements because of '… modern-day conditions and attitudes and the tendency towards a more itinerant lifestyle, particularly among business people. And because not to do so might allow certain persons habitually to avoid the jurisdictional nets of the

[20] LAWSA Vol 2 Second ed (updated by Ellison Kahn) para 346 at page 384.
[21] 2001 (4) SA 27 (C).
[22] At 30H and see also page 31D and *Permanent Investment Building Society v Vogel* (1910) 31 NLR 402.
[23] *Westdeutsche Landesbank Girozentrale (Landesbausparkasse) v Horsch* 1993 (2) SA 342 (Nm) at 343J-344A where the court held, inter alia, that the jurisdiction of a foreign court would be recognised where the defendant was physically be present in the area of the foreign court at the time of the institution of the proceedings there approved of in *Blanchard, Krasner & French v Evans* 2004 (4) SA 427 (W) at 431F-I.
[24] 2001 (2) SA 1239 (SCA) at 1243I-1244B.

courts and thereby escape legal accountability for the wrongful actions.'

In my view having regard to all of the above factors the view expressed by *Pollak* quoted with approval by Van Dijkhorst J in *Reiss*[25] should be followed.

[10] I now turn to consider the two remaining defences raised in the court *a quo,* the provisions of the Protection of Business Act 99 of 1978 (the Act) and public policy.

[11] Section 1(1) of the Act provides that, except with the permission of the Minister of Economic Affairs, no judgment, order or arbitration award delivered, given, issued or emanating from outside the Republic and arising from any act or transaction contemplated in ss (3) shall be enforced in the Republic. Section 1(3) reads:

'(3) In the application of ss (1)(a) an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.'

The wording of the section refers to transactions connected with raw materials or substances. Even manufactured goods are excluded from the operation of the

[25] Supra at p 1037 *in fin*. See also the comprehensive article by Professor Sieg Eiselen which is critical of the judgment of the court *a quo* –(2006) *SA Mercantile Law Journal* Vol 18 No 145 – 52.

Act.[26] The plaintiff's claim is for services and disbursements related to negotiations, advice, drafting of contract documents, and incidental matters pertaining to a restructuring, rearrangement, and (ultimately) dissolution of joint ventures between the respondent, on the one hand, and various affiliates of the De Beers group of companies.

If manufactured goods are sufficiently remote from 'matter' and 'material' within the meaning of the Act, by parity of reasoning there can be no scope for applying it to a claim for payment sounding in money where the claim is one for professional services rendered. I accordingly consider that this defence is without merit.

[12] As to public policy considerations the defendant baldly contends that, because appellant is not an attorney duly admitted to practise locally, nor a solicitor admitted to practise in the United Kingdom, he is not entitled, in terms of South African legislation, to levy fees. This complaint is misdirected: the question is not whether appellant was entitled in terms of South African legislation to charge for the services and rendered disbursements made by him, but whether he was permitted to do so in England, where he was mandated by defendant and where the services were rendered and disbursements incurred.

No facts were adduced by defendant to show that plaintiff was prohibited in England from obtaining payment of the amounts claimed. On the contrary:

[26]See *Chinatex Oriental Trading Co v Ersken* supra 1998 (4) SA 1087(C) 1095F-1096C and *Tradex Ocean Transportation SA v M V Silvergate (or Astyanax) and Others* 1994 (4) SA 119 (D) at 121A-D.

plaintiff practises in England as a South African attorney practising foreign law, which is a valid and accepted practice in England. There is no bar in England to such practitioners recovering fees for services rendered by them.

Insofar as the position in South Africa is concerned, appellant is – contrary to respondent's contention – an attorney of this Court, having been admitted as such in 1963, though no longer practising as such.

There are no considerations of public policy which militate against the recognition or enforcement of applicant's claim for his fees and disbursements arising from the services lawfully rendered by him in England. If anything public policy would require the recognition by a South African court of a lawful judgment given by default by an English court where personal service in England had taken place.

[13] In all the circumstances the appellant's action for provisional sentence should have succeeded. Accordingly the appeal is allowed with costs.

The order of the court *a quo* is set aside and replaced with the following order:

Provisional sentence is granted in favour of the plaintiff against the defendant for payment of:

(a) 57 882.179 English Pounds, alternatively the Rand equivalent thereof

determined in accordance with the exchange rate prevailing as at the date of payment;

(b) Interest on the aforesaid sum at the rate of 8 per cent per annum from 17 December 2003 to date of payment;

(c) The defendant is to pay the plaintiff's costs of suit.

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R H ZULMAN
JUDGE OF APPEAL

CONCUR:) CAMERON JA
) BRAND JA
) MAYA JA
) THERON AJA