

SOUTH AFRICA / JUDGMENT

ACL Group (Edms) Bpk and Others v Qick Televentures FZE (2013 (1) SA 508 (FB)) [2012] ZAFSHC 249; [2012] ZAFSHC 145 (12 July 2012)

[2012] ZAFSHC 249

COURT

Free State High Court, Bloemfontein

BEFORE

Snellenburg

CASE / FILE NUMBER

82/2012

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29FREE STATE HIGH COURT, BLOEMFONTEINREPUBLIC OF SOUTH AFRICACase No. : 82/2012In the matter between:-ACL GROUP (EDMS)

BPK.....1stApplicantINTARA TRADING

BK.....2ndApplicantACL/INTARA GESAMENTLIKE

ONDERNEMINGS.....3rdApplicantandQICK TELEVENTURES

FZE.....RespondentDELIVERED BY:SNELLENBURG, AJHEARD:21

JUNE 2012DELIVERED:12 JULY 2012[1] This is an application in terms of the provisions of section 19 of the Supreme Court Act 59 of 1959 [‘the Supreme Court Act’] to confirm jurisdiction [ad fundam jurisdictionem] or found jurisdiction [ad confirmandam jurisdictionem] by attachment of certain movable assets of the respondent.[2] The applicants, ACL Group (Pty) Ltd, Intara Trading CC and ACL/Intara Gesamentlike Ondernemings areincolaof the area of jurisdiction of this Court. The respondent is Qick Televentures FZE, a company established and incorporated in the United Arab Emeritis. It has registered offices or a principal place of business at 111 Ras Al Khaimah, United Arab Emirates.[3] The respondent entered into a contract with Nokia Siemens Network [‘the main contract’] to, amongst other things, supply, install, test, complete and render other services for a fixed and/or mobile telecommunications network in the Republic of South Africa and specifically to install telecommunication cables next to the N1 (national road) between Bloemfontein (Free State province) and Colesberg (Northern Cape province). On 14 February 2011 the respondent was registered as an external company in terms of section 322 of the Companies Act 61 of 1973 [‘the previous Act’], which has subsequently been repealed by theCompanies Act 71 of 2008[‘the currentCompanies Act’]. The ‘local’ registered address in terms of the aforesaid registration is at West Wing, Birchwood Court, Montrose Street 43, Gauteng province.[4] The applicants allege that the second applicant [‘the service provider’] and the respondent concluded an oral agreement for the supply of certain subcontracting services which related to horizontal drilling and ancillary services such as the rental of certain equipment, which agreements were subsequently contained in a written

subcontracting agreement, during March 2011. The written agreement provides for the supply, by the service provider, of specific services, associated equipment and materials so as to enable the respondent to satisfy its obligations and liabilities under the main contract. The applicants contend that the written agreement does not correctly reflect the service provider as it refers to ACL/Intara Trading (Pty) Ltd, whilst it should contain the description of the second respondent, to wit Intara Trading CC. The applicants also allege that the first applicant, alternatively the first and third applicant entered into several oral agreements with the respondent for the rental and supply of drilling equipment and material.[5] It is the applicants case that the respondent is indebted to them for payment of the amount of R4 437 670.00 arising out of services duly rendered and equipment and material supplied in terms of the various agreements. The applicants intend to issue summons against the respondent for payment.[6] The applicants however allege that, by virtue of the respondent being aperegrinusdefendant, they are required to attach certain movable assets of the respondent in order to either confirm jurisdiction that already

exists or to found jurisdiction in this Court.[7] It is trite that the attachment to found jurisdiction is necessary to create jurisdiction where no otherratio jurisdictionis(jurisdictional ground) exists at all. If any recognised jurisdictional ground does exist, then theincolastill needs to confirm or strengthen the court's jurisdiction by attachment of property of theperegrinusdefendant (or property wherein theperegrinusdefendant has a material interest).[8] Although the papers became quite prolix, the respondent persists only with the following grounds in the order as set out hereunder, and in the alternative to each other, in opposition to the application:8.1 that the applicants cannot attach any assets of the respondent to found jurisdiction as the defendant is resident in the Republic;8.2 that the applicants cannot confirm jurisdiction as noratio jurisdictionisexists;8.3 that the applicants should have approached the South Gauteng High Court to found or confirm jurisdiction as the contract was on the balance of probabilities concluded in that court's jurisdiction and the respondent 'resides' there.8.4 that the applicants have failed to make out a prima facie case.[9] It is convenient to make certain general observations regarding applications for attachment to confirm or found jurisdiction. As explained by Harms JA in *TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD* 2006 (4) SA 177 (SCA) at para 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. 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.' The remedy of attachment ad fundam jurisdictionem in order to create jurisdiction, or ad confirmandam jurisdictionem to confirm jurisdiction, are exceptional and extraordinary remedies and should be applied with care and caution. An attachment or arrest serves also to provide an incolawith property or security in South Africa against which he can execute the judgment in the event of

his action being successful. A court to which the application is made has no discretion to refuse it once the requirements for an order are met. In *LONGMAN DISTILLERS LTD v DROP INN GROUP OF LIQUOR SUPERMARKETS (PTY) LTD* 1990 (2) SA 906 (A) at 914E - G Nicholas AJA held as follows: 'In our law, once an applicant (plaintiff) establishes that, *prima facie*, he has a good cause of action against the peregrine respondent (defendant), the Court must, if other requirements are satisfied,

grant an order for the attachment *fundam* of the property of the peregrine respondent (defendant). It has no discretion (Pollak *The South African Law of Jurisdiction* at 64, citing *Lecomte v W and B Syndicate of Madagascar* 1905 TS 696 at 702). The Court will not inquire into the merits or whether the Court is a convenient forum in which to bring the action (Pollak (ibid)). Nor, it is conceived, will the Court inquire whether it is "fair" in the circumstances for an attachment order to be granted.' (See also *NAYLOR AND ANOTHER v JANSEN; JANSEN v NAYLOR AND OTHERS* 2006 (3) SA 546 (SCA) at 559 para 27; *SIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS* 1999 (1) SA 217 (SCA); *WEISSGLASS NO v SAVONNERIE ESTABLISHMENT* 1992 (3) SA 928 (A) at 937C - F; *THERMO RADIANT OVEN SALES (PTY) LTD v NELSPRUIT BAKERIES (PTY) LTD* 1969 (2) SA 295 (A) at 302C - D.) In *NAYLOR* supra Scott JA held at 560 C-D [para 27] that: 'It follows that an applicant for an order of attachment or arrest to found or confirm jurisdiction is under no obligation first to invite the respondent peregrine to submit to the jurisdiction, nor does the latter enjoy a right to be afforded an opportunity to submit to the jurisdiction before the applicant seeks an arrest or attachment order. (See *Associated Marine Engineers D (Pty) Ltd v Foroya Banki PF* 1994 (4) SA 676 (C) at 688G - J.)' In the *NAYLOR* case the distinguished Judge also held at 561A that the purpose of the attachment procedure is to assist an applicant. [10] In order to succeed with an application for attachment *confirmandam jurisdictionem*, the applicant must satisfy the following requirements on a balance of probabilities, to wit: (i) a *prima facie* cause of action against the defendant; (ii) that the defendant is a peregrinus; (iii) that the property in which the peregrinus defendant has a beneficial interest is within the Republic; and (iv) that the cause of action arose in the area of jurisdiction of the court. In order to succeed with an application for attachment *fundam jurisdictionem* the applicant must in addition to (i) and (ii) above prove that the property in which the peregrinus defendant has a beneficial interest is within the area of jurisdiction of the court. [11] Mr Fischer, on behalf of the respondent, argues that as a point of departure, the applicants have failed to identify whether they apply to confirm jurisdiction, alternatively whether they apply to found jurisdiction. The rationale for the distinction is obvious from what has been set out above. The requirements that the applicant needs to satisfy regarding the afore-mentioned, as stated above, also differs to some extent. As far as the distinction goes, the submission is undoubtedly correct. I do not agree with the submission that the applicants had to elect to apply for either the one or the other. The applicants were entitled to apply that the court 'confirm or [alternatively] found jurisdiction' (my own insertion). It created no uncertainty. What needs to be determined is whether the applicants have satisfied the requirements either to confirm or to found jurisdiction. [12] The submissions on behalf of the parties clearly show that the real dispute, and the crux of this matter, revolves around whether the respondent is a peregrinus. The requirement relates to both an application to confirm or found jurisdiction, as

stated above. Although the respondent admits that it is a peregrinus of the area of jurisdiction of this court, Mr Fischer, acting on behalf of the respondent, submitted that the respondent's registration as external company in terms of section 322, and the designation of a registered address in terms of section 170 of the previous Act, has as consequence that it carries on business in the Republic of South Africa and is as such sufficiently resident in the Republic to confer jurisdiction, especially insofar as it relates to the contract in question. In amplification of the argument, Mr Fischer relies on the judgments in *SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD* 1982 (2) SA 739(W) and *APPLEBY (PTY) LTD v DUNDAS LTD* 1948 (2) SA 905(E). In the *SKJELBREDS* case the court held that the mere fact that an external company has a registered office or even a branch office, in addition to the registered office in the Republic, does not constitute residence for the purpose of conferring jurisdiction on the Court. *Vermooten J* held that such external company will however be sufficiently resident if the cause of action also arose from the business activities of the branch.[13] If the respondent is resident in the Republic, the application must (not may) be dismissed. Section 28(1) of the Supreme Court Act, which is peremptory, reads: 'No attachment of person or property to found jurisdiction shall be ordered by a court of any division against a person who is resident

in the Republic.' [14] Mr Van Rhyn, on behalf of the applicants, relies on the judgment of *Streicher J*, as he then was, in *JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION* 1997 (3) SA 34(W), where the distinguished Judge held that an external company cannot be said to be resident at its registered address in terms of section 322 and 170 of the previous Act.[15] In the heads of argument on behalf of the respondent it is postulated that the respondent's status is still governed by section 322 and 170 of the previous Act, as it was registered in terms of the said Act prior to the date on which the current Companies Act commenced. The applicants also argued the application on this basis. I cannot agree. The current Companies Act came into effect on 1 May 2011. In terms of the transitional arrangements contained in section 2(6) of schedule 5 of the current Companies Act, an external company that, immediately before the effective date, was registered as such in terms of the previous Act must be regarded as having [been] registered on the effective date as an external company in terms of the current Companies Act. It follows that, save for the objective fact that the respondent, as foreign company, was duly registered as an external company in terms of the provisions of the previous Act on the date of the commencement of the current Companies Act, the matter must be decided in terms of the provisions of the current Companies Act [71 of 2008]. [16] The current Companies Act defines a 'foreign company' as an entity incorporated outside the Republic, irrespective of whether it is: (a) a profit, or non-profit, entity; or (b) carrying on business or non-profit activities, as the case may be, within the Republic. An 'external company' means a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2). Section 23, which deals with the registration and the registered office of an external company, provides as follows: 'Registration of external companies and registered office (1) An external company must register with the Commission within 20 business days after it first begins to conduct business, or non-profit activities, as the case may be, within the Republic - (a) as an external non-profit company if, within the jurisdiction in which it was incorporated, it meets legislative or definitional

requirements that are comparable to the legislative or definitional requirements of a non-profit company incorporated under this Act; or(b) as an external profit company, in any other case.(2) For the purposes of subsection (1), and the definition of 'external company' as set out in section 1, a foreign company must be regarded as 'conducting business, or non-profit activities, as the case may be, within the Republic' if that foreign company-(a) is a party to one or more employment contracts within the Republic; or(b) subject to subsection (2A), is engaging in a course of conduct, or has engaged in a course or pattern of activities within the Republic over a period of at least six months, such as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within the Republic.(2A) When applying subsection (2)(b), a foreign company must not be regarded as 'conducting business activities, or non-profit activities, as the case may be, within the Republic' solely on the ground that the foreign company is or has engaged in one or more of the following activities:(a) Holding a meeting or meetings within the Republic of the shareholders or board of the foreign company, or otherwise conducting any of the company's internal affairs within the Republic;(b) establishing or maintaining any bank or other financial accounts within the Republic;(c) establishing or maintaining offices or agencies within the Republic for the transfer, exchange, or registration of the foreign company's own securities;(d) creating or acquiring any debts within the Republic, or any mortgages or security interests in any property within the Republic;(e) securing or collecting any debt, or enforcing any mortgage or security interest within the Republic; or(f) acquiring any interest in any property within the Republic.(3) Each company or external company must-(a) continuously maintain at least one office in the Republic; and(b) register the address of its office, or its principal office if it has more than one office-(i) initially in the case of-(aa) a company, by providing the required information on its Notice of Incorporation; or(bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and(ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.(4) A change contemplated in subsection (3) (b) (ii) takes effect as from the later of-(a) the date, if any, stated in the notice; or(b) five business days after the date on which the notice was filed.(5) The Commission must-(a) assign a unique registration number to each external company that has registered in accordance with subsection (1);(b) maintain a register of external companies;(c) enter the prescribed information concerning each external company in the register; and(d) in the case of an external company whose name is a foreign registration number but does not indicate the name of the foreign jurisdiction in which it was incorporated, append to its name on the registry the name of that jurisdiction in a manner comparable to that required for a company under section 11 (3) (a).(6) If an external company has failed to register in terms of subsection (1) within three months after commencing its activities within the Republic, the Commission may issue a compliance notice to that external company requiring it to-(a) register as required by subsection (1) within 20 business days after receiving the notice; or(b) if it fails to register within the time allowed in paragraph (a), to cease carrying on its business or activities within the Republic.[17] Section 170 and 322 of the previous Act provided as follows regarding the registration of an external company and the designation of a registered address by an external company: '170(1) Every company, including every external company, shall have in the Republic - (a) a postal address to which all communications and notices may be addressed; and(b) a

registered office to which all communications and notices may be addressed and at which all process may be served.”³²²(1) Every external company shall within twenty-one days after the establishment of a place of business in the Republic lodge with the Registrar, in the prescribed manner-(a)a certified copy of the memorandum of the company, and if the said memorandum is not in one of the official languages of the Republic, a certified translation thereof in one of those languages;(b)a notice under section 170 in the prescribed form of the registered office and postal address of the company;’^[18] For the same considerations as stated in *ISM INTER v MARALDO AND ANOTHER*^{1983 (4) SA 112(TPD)} at 114E-F, the cases dealing with this issue under the previous Act, including those on which the parties rely, cannot be distinguished on the basis of the legislation only that was interpreted. To my mind the current Companies Act contains similar provisions regarding the registration and appointment of a registered office, or put differently, the current Companies Act does not contain provisions that can be said to materially affect the reasoning and ratio decidendi of the previous judgments to which I have been referred.^[19] It is trite that at common law the residence of the defendant entrenches the jurisdiction of the relevant forum. (See *JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION*^{1997 (3) SA 34(W)} at 37C-D; *BISONBOARD LTD v K BRAUN WOODWORKING MACHINERY (PTY) LTD*^{[1990] ZASCA 86;1991 (1) SA 482(A)} at 487C).^[20] The question posed in this matter is simply whether a foreign company which has been duly registered as an external company in terms of the Companies Act and which conducts business in the Republic is resident in the Republic for the purposes of section 28(1) of the Supreme Court Act.

For the reasons that follow, I am of the opinion that a duly registered external company, conducting business in the Republic,

cannot be said to be resident in the Republic for purposes of section 28(1) of the Supreme Court Act, regardless that the cause of action (dispute) arises from the business activities of the external company in the Republic.^[21] It is efficacious to keep in mind that the Companies Act deliberately distinguishes between domestic and external companies. Reference to a company in the Act does not include a reference to an external company. Their terms have different meanings and the requirements and obligations pertaining to a domestic company differ from the requirements and obligations of an external company. This was also the position under the previous Act. Admittedly the current Act contains provisions regarding external companies that the previous Act did not. That much is apparent by simply considering section 23. Several sections in the Companies Act deal with external companies, for example the obligation to furnish annual returns (section 33(2) and so forth). A detailed exposé on the different sections and the differences between the current Companies Act and previous Companies Act is, however, not necessary for purposes of this judgment. In *WISEMAN v ACE TABLE SOCCER (PTY) LTD*¹⁹⁹¹

- (4) SA 171(W) at 176F – I, it was held that the purpose of registration of an external company under the previous Act, was to ensure that an external company, after complying with such procedures, will be on equal par with a South African incorporated company. That is also the purpose of registration of an external company under the present Act. That does not mean that an external company is resident in the Republic.^[22] Section 23 requires that an external

company continuously maintain at least one office in the Republic and register the address of its office, or its principal office, if it has more than one office. Section 322, of the previous Act, also required that an external company shall have in the Republic a registered office to which all communications and notices may be addressed and at which all process may be served. In essence, both require the same thing. As has consistently been held, the mere fact that an external company has a registered office or even branch offices and is conducting business in the Republic is not enough to make it resident in the Republic for the purposes of section 28(1) of the Supreme Court Act.^[23] In *JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION*^{supra}, Streicher J, pointed out that the provisions regarding the keeping of official documents at the registered address of a domestic company do not apply to an external company. This is also the position in the (current) Companies Act. The Judge further held at 38H-39B that: "These provisions relating to external companies do not attract the inference that the Legislature intended to endow the registered

office of an external company with the quality of being the place to which the world can look as the legal home and administrative centre of the external company. In my view they indicate the opposite when compared with the provisions relating to the registered address of a domestic company. Moreover, considerations of commercial convenience and expediency militate against viewing the registered office of an external company as the residence of the external company. Should such registered office be deemed to be the residence of an external company, any peregrinus would be entitled to sue the external company in the Court in whose area of jurisdiction the external company's registered office in the Republic is situated, wherever the cause of action may have arisen. The Legislature could, in my view, not have intended

such a result. In the premises, in my view, an external company cannot be said to be resident at its registered office in terms of ss 322 and 170 of the Companies Act.' The ratio is equally relevant to the current Companies Act.^[24] In *DAIRY BOARD v JOHN T RENNIE & CO (PTY) LTD* 1976 (3) SA 768(W) it was held that a domestic company registered in South Africa resides in law where the registered office is. If its principal place of business is situated elsewhere it may also reside at the latter place. The finding was subsequently confirmed in *BISONBOARD LTD v K BRAUN WOODWORKING MACHINERY (PTY) LTD* [1990] ZASCA 86; 1991 (1) SA 482(A). The ratio decidendi was however distinguished in *JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION* 1997 (3) SA 34(W) at 37C-D, on the basis that the same did not apply to an external company. In *LEIBOWITZ T/A LEE FINANCE v MHLANA AND OTHERS* 2006 (6) SA 180(SCA), it was held that the principal place of business of a company for jurisdictional purposes, is the place where the central control and management of the company is situated. It is not the respondent's case that the central control and management of the company is situated at its registered address in the Republic. It also appears unlikely that a foreign company would have the seat of its central control and management in another country.^[25] To this end, and as stated, the court in *SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD* 1982 (2) SA 739(W), on which the respondent relies, also held that the mere fact that an external company has a registered office and branch office in the Republic (and conducts business in the Republic) does not constitute residence for the purpose of conferring jurisdiction on the Court. In that judgment

however the court, as stated, held that the cause of action (the dispute) also needed to arise out of the business of the external company for it to be resident. This is also referred to as the causation qualification. The court followed a long line of cases with this finding. See *LUNT v BALMORAL DIAMOND MINING CO LTD* (1906) 10 HCG 58 at 59 and *APPLEBY (PTY) LTD v DUNDAS LTD* 1948 (2) SA 905(E) at 909-910. The *SKJELBREDS* ratio was confirmed in *ISM INTER LTD v MARALDO AND ANOTHER*, supra. I cannot agree with this line of reasoning. I fail to understand why the mere fact that the cause of action arises out of the business activities of the external company will make it resident, whilst had the cause of action not arisen out of the business activities of the company, it would not have been resident. I am fortified in my view in light of the finding by Harms JA in *TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD* [2006] ZASCA 28; 2006 (4) SA 177(SCA) at para 3: 'In the present context, the difference between an arrest or attachment and a fundam jurisdiction and one of a confirmam jurisdiction is of no consequence. 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.'² With 'jurisdiction' is meant the power to adjudicate upon a particular case and to give effect to the judgment.'³ To my mind the findings of the Supreme Court of appeal in *LEIBOWITZ T/A LEE FINANCE v MHLANA AND OTHERS* and *TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD*, read with the finding in the *JOSEPH* case (supra) settles the matter. [26] The decision in *SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD* supra, was considered by the Appeal Court and reversed, but the Court of Appeal, significantly, did not confirm the court's findings

with regards to this issue. That Court held that in light of its finding regarding others issues, that the appeal had to succeed and that it was therefore not necessary to deal with the specific point. (See *SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD* 1982 (2) SA 710(A) at p 729F - G.) From the afore-mentioned it is clear that the mere registration and continuous maintenance of an office in the Republic and conducting of business, does not in itself make the external company resident in the Republic. The fact that the cause of action (the dispute) arose from the business activities that the external company conducts in the Republic does not make it resident for purposes of section 28(1). It will merely serve as a jurisdictional ground at common law which, depending on whether it arose in the area of jurisdiction where the company is resident, may entitle the court to confirm the court's jurisdiction. [27] It is necessary, notwithstanding my finding above, to deal with Mr Fischer's submission that Streicher J, when considering the matter in the *JOSEPH* case, supra, was apparently not referred to the dictum in *SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD* 1982

- (2) SA 739(W). The Judge admittedly does not refer to the judgment. That does not mean that the Judge did not consider the judgment or the reasoning on which the judgment relies. In the *JOSEPH* judgment the case of *ISM INTER LTD v MARALDO AND ANOTHER* 1983 (4) SA 112(TPD), was thoroughly considered. In the *ISM* case the judgments in, inter

alia,SKJELBREDSSupraandAPPLEBY (PTY) LTD v DUNDAS LTD1948 (2) SA 905(E), with regards to the so-called 'cause of action qualification', were considered and discussed. Streicher J clearly considered the reasoning in the respective cases ofSKJELBREDSSandAPPLEBY.[28] I am satisfied that the applicants have therefore satisfied the requirement to prove that the Respondent is aperegrinusdefendant.[29] The applicants must, either to confirm or found jurisdiction, show the existence of a prima facie cause of action against the defendant.As reiterated inSIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS[1998] ZASCA 79;1999 (1) SA 217(SCA) at 228C-D, this requirement 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 Portnet (Bouygues Offshore SA and Another Intervening)1998 (3) SA 861(SCA) at E 868B--H)'(See alsoLONGMAN DISTILLERS LTD v DROP INN GROUP OF LIQUOR SUPERMARKETS (PTY) LTD[1990] ZASCA 39;1990 (2) SA 906(A) at 914E-F).[30] The respondent disputes that the applicants have satisfied this requirement, because it is alleged that the applicants rely on 'so-called' amendments and alterations to the contract and its pricing as basis for their cause of action. The respondent says that any amendments will be hit by the 'non-variation' clause (or so-calledShifrenprinciple), as the amendments and alterations were not in writing.[31] I am satisfied that the applicants have passed the low threshold to satisfy this requirement. The papers show,prima facie, correspondence from the respondent regarding the amendment of orders and the pricing for drilling. Furthermore, the first and/or third applicant relies on separate oral agreements with the respondent. The respondent itself admits payments for the rental of equipment. It is clear that services were rendered. At the very least, it cannot be found if the evidence is assessedas a whole, that the applicants clearly have no action, or cannot succeed. The same applies for the intended claim for rectification.[32] The applicants also need to prove, in order to satisfy the third requirement, that the property which they seek to attach(a) is property in which the respondent has a beneficial interest;(b) that the property is within the Republic for purposes of confirming jurisdiction if the cause of action arose in the court's area of jurisdiction; or(c) that the property is within this court's area of jurisdiction if they seek to found jurisdiction.[33] It is common cause between the parties that the property is not situated in the area of jurisdiction of this court, but that it is situated in the Republic. Although the respondent has not disclosed the exact location, it is common cause that the property was situated in the Northern Cape Province, where it would be utilised, when these proceedings were initiated. The respondent denied in its papers that it is the owner of the property. The evidence on a whole shows that, at the very least, the respondent has a beneficial interest in the property.[34] The applicants must lastly prove that the cause of action arose in the court's area of jurisdiction for confirmation of jurisdiction. On the evidence as it stands it cannot be found that any of contracts on which the applicants rely, were concluded in this Court's area of jurisdiction. The respondent however admits that part of the contract was to be executed in the Free State Province. This

is also supported by the invoices which were rendered. As was held in *ROBERTS CONSTRUCTION CO LTD v WILLCOX BROS (PTY) LTD* 1962 (4) SA 326(A), a High Court has jurisdiction in terms of a cause of action in terms of section 19(1)(a) of the Supreme Court Act when a material element of the cause of action falls in that court's jurisdiction, such as partial

performance of the contractual obligations in the area of jurisdiction of such court. This court will therefore have jurisdiction over the cause of action. As such a jurisdictional ground exists that can be confirmed to strengthen the court's jurisdiction. (See also *THOMAS v BMW SOUTH AFRICA (PTY) LTD* 1996

- (2) SA 106(C). [35] For these reasons I am satisfied that the applicants have met all the requirements for an order that the property of the respondent be attached *ad confirmandam jurisdictionem*. [36] In the result I make the following order: The application succeeds; An order is granted in terms of prayer 1 of the applicants Notice of Motion; The attachment will lapse if the applicants fail to institute an action in this division against the respondent within 30 days after this order, the day of the order to be excluded and the last day to be included in calculation of the 30 day period; The respondent is ordered to pay the costs of the application, such costs to include the costs occasioned by the employment of two counsel. ____
- ____ *SNELLENBURG, AJA* APPEARANCES: On behalf of the applicant: Adv AJR van Rhyn SC, assisted by Adv P du P Greyling Eugene Attorneys, Bloemfontein On behalf of first respondent: Adv PU Fischer, Instructed by: Neuhoff Attorneys, Bloemfontein NS/sp1 Ghomeshi-Bozorg v Yousefi 1998 (1) SA 692(W), where a contrary view was held, it is, to that extent, wrong. 2 *Ewing McDonald & Co Ltd v M & M Products Co* [1990] ZASCA 115; 1991 (1) SA 252(A) at 258D - G; *Naylor v Jansen*; *Jansen v Naylor* [2005] 4 All SA 26(SCA) in para [20] 3 *Steytler NO v Fitzgerald* 1911 AD 295 at 346; *Hugo v Wessels* 1987 (3) SA 837(A) at 849H; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation)* 1987 (4) SA 883(A) at 886D - E.

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 82/2012

In the matter between:-

ACL GROUP (EDMS) BPK.....1st Applicant

ACL GROUP (EDMS) BPK

.....

st

INTARA TRADING BK.....2nd Applicant

INTARA TRADING BK

.....

nd

ACL/INTARA GESAMENTLIKE ONDERNEMINGS.....3rdApplicant

ACL/INTARA GESAMENTLIKE ONDERNEMINGS

.....

rd

and

QICK TELEVENTURES FZE.....Respondent

QICK TELEVENTURES FZE

.....

DELIVERED BY:SNELLENBURG, AJ

DELIVERED BY:

HEARD:21 JUNE 2012

HEARD:

DELIVERED:12 JULY 2012

DELIVERED:

[1] This is an application in terms of the provisions of section 19 of the Supreme Court Act 59 of 1959 [‘the Supreme Court Act’] to confirm jurisdiction [ad fundandam jurisdictionem] or found jurisdiction [ad confirmandam jurisdictionem] by attachment of certain movable assets of the respondent.

the Supreme Court Act’

ad fundandam jurisdictionem

ad confirmandam jurisdictionem

[2] The applicants, ACL Group (Pty) Ltd, Intara Trading CC and ACL/Intara Gesamentlike Ondernemings are incola of the area of jurisdiction of this Court. The respondent is Qick Televentures FZE, a company established and incorporated in the United Arab Emirates. It has registered offices or a principal place of business at 111 Ras Al Khaimah, United Arab Emirates.

incola

- [3] The respondent entered into a contract with Nokia Siemens Network [‘the main contract’] to, amongst other things, supply, install, test, complete and render other services for a fixed and/or mobile telecommunications network in the Republic of South Africa and specifically to install telecommunication cables next to the N1 (national road) between Bloemfontein (Free State province) and Colesberg (Northern Cape province). On 14 February 2011 the respondent was registered as an external company in terms of section 322 of the Companies Act 61 of 1973 [‘the previous Act’], which has subsequently been repealed by the Companies Act 71 of 2008 [‘the current Companies Act’]. The ‘local’ registered address in terms of the aforesaid registration is at West Wing, Birchwood Court, Montrose Street 43, Gauteng province.

Companies Act 71 of 2008

Companies Act

- [4] The applicants allege that the second applicant [‘the service provider’] and the respondent concluded an oral agreement for the supply of certain subcontracting services which related to horizontal drilling and ancillary services such as the rental of certain equipment, which agreements were subsequently contained in a written subcontracting agreement, during March 2011. The written agreement provides for the supply, by the service provider, of specific services, associated equipment and materials so as to enable the respondent to satisfy its obligations and liabilities under the main contract. The applicants contend that the written agreement does not correctly reflect the service provider as it refers to ACL/Intara Trading (Pty) Ltd, whilst it should contain the description of the second respondent, to wit Intara Trading CC. The applicants also allege that the first applicant, alternatively the first and third applicant entered into several oral agreements with the respondent for the rental and supply of drilling equipment and material.
- [5] It is the applicants case that the respondent is indebted to them for payment of the amount of R4 437 670.00 arising out of services duly rendered and equipment and material supplied in terms of the various agreements. The applicants intend to issue summons against the respondent for payment.
- [6] The applicants however allege that, by virtue of the respondent being a peregrinus defendant, they are required to attach certain movable assets of the respondent in order to either confirm jurisdiction that already

exists or to found jurisdiction in this Court.

peregrinus

[7] It is trite that the attachment to found jurisdiction is necessary to create jurisdiction where no other ratio jurisdictionis (jurisdictional ground) exists at all. If any recognised jurisdictional ground does exist, then the incola still needs to confirm or strengthen the court's jurisdiction by attachment of property of the peregrinus defendant (or property wherein the peregrinus defendant has a material interest).

ratio jurisdictionis

[8] Although the papers became quite prolix, the respondent persists only with the following grounds in the order as set out hereunder, and in the alternative to each other, in opposition to the application:

8.1 that the applicants cannot attach any assets of the respondent to found jurisdiction as the defendant is resident in the Republic;

8.2 that the applicants cannot confirm jurisdiction as no ratio jurisdictionis exists;

8.3 that the applicants should have approached the South Gauteng High Court to found or confirm jurisdiction as the contract was on the balance of probabilities concluded in that court's jurisdiction and the respondent 'resides' there.

8.4 that the applicants have failed to make out a prima facie case.

[9] It is convenient to make certain general observations regarding applications for attachment to confirm or found jurisdiction. As explained by Harms JA in *TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD* 2006 (4) SA 177 (SCA) at para 4:

TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD

'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. 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.'

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The remedy of attachment *ad fundandam jurisdictionem* in order to create jurisdiction, or *ad confirmandam jurisdictionem* to confirm jurisdiction, are exceptional and extraordinary remedies and should be applied with care and caution. An attachment or arrest serves also to provide an *incola* with property or security in South Africa against which he can execute the judgment in the event of his action being successful. A court to which the application is made has no discretion to refuse it once the requirements for an order are met. In *LONGMAN DISTILLERS LTD v DROP INN GROUP OF LIQUOR SUPERMARKETS (PTY) Ltd* 1990 (2) SA 906 (A) at 914E - G Nicholas AJA held as follows:

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LONGMAN DISTILLERS LTD v DROP INN GROUP OF LIQUOR SUPERMARKETS (PTY)

Ltd 1990 (2) SA 906 (A) at 914E - G Nicholas AJA held as follows:

'In our law, once an *incola* applicant (plaintiff) establishes that, *prima facie*, he has a good cause of action against the peregrine respondent (defendant), the Court must, if other requirements are satisfied,

grant an order for the attachment *ad fundandam* of the property of the peregrine respondent (defendant). It has no discretion (Pollak *The South African Law of Jurisdiction* at 64, citing *Lecomte v W and B Syndicate of Madagascar* 1905 TS 696 at 702). The Court will not inquire into the merits or whether the Court is a convenient forum in which to bring the action (Pollak (*ibid*)). Nor, it is conceived, will the Court inquire whether it is "fair" in the circumstances for an attachment order to be granted.'

prima facie

ad fundandam

(See also *NAYLOR AND ANOTHER v JANSEN; JANSEN v NAYLOR AND OTHERS* 2006 (3) SA 546 (SCA) at 559 para 27; *SIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS* 1999 (1) SA 217 (SCA); *WEISSGLASS NO v SAVONNERIE ESTABLISHMENT* 1992 (3) SA 928 (A) at 937C – F; *THERMO RADIANT OVEN SALES (PTY) LTD v NELSPRUIT BAKERIES (PTY) LTD* 1969 (2) SA 295 (A) at 302C–D.) In *NAYLOR* supra Scott JA held at 560 C-D [para 27] that:

NAYLOR AND ANOTHER v JANSEN; JANSEN v NAYLOR AND OTHERS

SIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS

WEISSGLASS NO v SAVONNERIE ESTABLISHMENT

THERMO RADIANT OVEN SALES (PTY) LTD v NELSPRUIT BAKERIES (PTY) LTD

NAYLOR

supra

‘It follows that an applicant for an order of attachment or arrest to found or confirm jurisdiction is under no obligation first to invite the respondent peregrine to submit to the jurisdiction, nor does the latter enjoy a right to be afforded an opportunity to submit to the jurisdiction before the applicant seeks an arrest or attachment order. (See *Associated Marine Engineers D (Pty) Ltd v Foroya Banki PF* 1994 (4) SA 676 (C) at 688G - J.)’

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[10] In order to succeed with an application for attachment ad confirmandam jurisdictionem, the applicant must satisfy the following requirements on a balance of probabilities, to wit:

(i) a prima facie cause of action against the defendant;

- (ii) that the defendant is aperegrinus;
- (iii) that the property in which the peregrinus defendant has a beneficial interest is within the Republic; and
- (iv) that the cause of action arose in the area of jurisdiction of the court.

In order to succeed with an application for attachment *fundam jurisdictionem* the applicant must in addition to (i) and (ii) above prove that the property in which the peregrinus defendant has a beneficial interest is within the area of jurisdiction of the court.

[11] Mr Fischer, on behalf of the respondent, argues that as a point of departure, the applicants have failed to identify whether they apply to confirm jurisdiction, alternatively whether they apply to found jurisdiction. The rationale for the distinction is obvious from what has been set out above. The requirements that the applicant needs to satisfy regarding the aforementioned, as stated above, also differs to some extent. As far as the distinction goes, the submission is undoubtedly correct. I do not agree with the submission that the applicants had to elect to apply for either the one or the other. The applicants were entitled to apply that the court 'confirm or [alternatively] found jurisdiction' (my own insertion). It created no uncertainty. What needs to be determined is whether the applicants have satisfied the requirements either to confirm or to found jurisdiction.

alternatively

[12] The submissions on behalf of the parties clearly show that the real dispute, and the crux of this matter, revolves around whether the respondent is aperegrinus. The requirement relates to both an application to confirm or found jurisdiction, as stated above. Although the respondent admits that it is aperegrinus of the area of jurisdiction of this court, Mr Fischer, acting on behalf of the respondent, submitted that the respondent's registration as external company in terms of section 322, and the designation of a registered address in terms of section 170 of the previous Act, has as consequence that it carries on business in the Republic of South Africa and is as such sufficiently resident in the Republic to confer jurisdiction, especially insofar as it relates to the contract in question. In amplification of the argument, Mr Fischer relies on the judgements in *SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD* 1982 (2) SA 739(W) and *APPLEBY (PTY) LTD v DUNDAS LTD* 1948 (2) SA 905(E). In the *SKJELBREDS* case the court held that the mere fact that an external company has a registered office or even a branch office, in addition to the registered office in the Republic, does not constitute residence for the purpose of conferring jurisdiction on the Court. *Vermooten J* held that such external company will however be sufficiently resident if the cause of action also arose from the business activities of the branch.

section 322

section 170

SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD

1982 (2) SA 739

APPLEBY (PTY) LTD v DUNDAS LTD

1948 (2) SA 905

SKJELBREDS

[13] If the respondent is resident in the Republic, the application must (not may) be dismissed. Section 28(1) of the Supreme Court Act, which is peremptory, reads:

‘No attachment of person or property to found jurisdiction shall be ordered by a court of any division against a person who is resident in the Republic.’

No attachment of person or property to found jurisdiction shall be ordered by a court of any division against a person who is resident in the Republic.’

[14] Mr Van Rhyn, on behalf of the applicants, relies on the judgment of Streicher J, as he then was, in JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION 1997 (3) SA 34(W), where the distinguished Judge held that an external company cannot be said to be resident at its registered address in terms of section 322 and 170 of the previous Act.

JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION

1997 (3) SA 34

[15] In the heads of argument on behalf of the respondent it is postulated that the respondent’s status is still governed by section 322 and 170 of the previous Act, as it was registered in terms of the said Act prior to the date on which the current Companies Act commenced. The applicants also argued the application on this basis. I cannot agree. The current Companies Act came into effect on 1 May 2011. In terms of the transitional arrangements contained in section 2(6) of schedule 5 of the current Companies Act, an external company that, immediately before the effective date, was registered as such in terms of the previous Act must be regarded as having [been] registered on the effective date as an external company in terms of the current Companies Act. It follows that, save for the objective fact that the respondent, as foreign company, was duly registered as an external company in terms of the provisions of the previous Act on the date of the commencement of the current Companies Act, the matter must be decided in terms of the provisions of the current Companies Act [71 of 2008].

Companies Act commenced

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section 2(6)

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[16] The current Companies Act defines a 'foreign company' as an entity incorporated outside the Republic, irrespective of whether it is: (a) a profit, or non-profit, entity; or (b) carrying on business or non-profit activities, as the case may be, within the Republic. An 'external company' means a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2). Section 23, which deals with the registration and the registered office of an external company, provides as follows:

Companies Act defines

section 23

Section 23

'Registration of external companies and registered office

Registration of external companies and registered office

- (1) An external company must register with the Commission within 20 business days after it first begins to conduct business, or non-profit activities, as the case may be, within the Republic-
 - (a) as an external non-profit company if, within the jurisdiction in which it was incorporated, it meets legislative or definitional requirements that are comparable to the legislative or definitional requirements of a non-profit company incorporated under this Act; or
 - (b) as an external profit company, in any other case.
- (2) For the purposes of subsection (1), and the definition of 'external company' as set out in section 1, a foreign company must be regarded as 'conducting business, or non-profit activities, as the case may be, within the Republic' if that foreign company-
 - (a) is a party to one or more employment contracts within the Republic; or
 - (b) subject to subsection (2A), is engaging in a course of conduct, or has engaged in a course or pattern of activities within the Republic over a period of at least six months, such as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within the Republic.

(2A) When applying subsection (2)(b), a foreign company must not be regarded as 'conducting business activities, or non-profit activities, as the case may be, within the Republic' solely on the ground that the foreign company is or has engaged in one or more of the following activities:

- (a) Holding a meeting or meetings within the Republic of the shareholders or board of the foreign company, or otherwise conducting any of the company's internal affairs within the Republic;
- (b) establishing or maintaining any bank or other financial accounts within the Republic;
- (c) establishing or maintaining offices or agencies within the Republic for the transfer, exchange, or registration of the foreign company's own securities;
- (d) creating or acquiring any debts within the Republic, or any mortgages or security interests in any property within the Republic;
- (e) securing or collecting any debt, or enforcing any mortgage or security interest within the Republic; or
- (f) acquiring any interest in any property within the Republic.

(3) Each company or external company must-

- (a) continuously maintain at least one office in the Republic; and
- (b) register the address of its office, or its principal office if it has

more than one office-

(i) initially in the case of-

(aa) a company, by providing the required information on its Notice of Incorporation; or

(bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and

(ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.

(4) A change contemplated in subsection (3) (b) (ii) takes effect as from the later of-

- (a) the date, if any, stated in the notice; or
- (b) five business days after the date on which the notice was filed.

(5) The Commission must-

- (a) assign a unique registration number to each external company that has registered in accordance with subsection (1);
- (b) maintain a register of external companies;

- (c) enter the prescribed information concerning each external company in the register; and
 - (d) in the case of an external company whose name is a foreign registration number but does not indicate the name of the foreign jurisdiction in which it was incorporated, append to its name on the registry the name of that jurisdiction in a manner comparable to that required for a company under section 11 (3) (a).
- (6) If an external company has failed to register in terms of subsection (1) within three months after commencing its activities within the Republic, the Commission may issue a compliance notice to that external company requiring it to-
- (a) register as required by subsection (1) within 20 business days after receiving the notice; or
 - (b) if it fails to register within the time allowed in paragraph (a), to cease carrying on its business or activities within the Republic.'

[17] Section 170 and 322 of the previous Act provided as follows regarding the registration of an external company and the designation of a registered address by an external company:

'170(1) Every company, including every external company, shall have in the Republic -

- (a) a postal address to which all communications and notices may be addressed; and
- (b) a registered office to which all communications and notices may be addressed and at which all process may be served.'

'322(1) Every external company shall within twenty-one days after the establishment of a place of business in the Republic lodge with the Registrar, in the prescribed manner-

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(a) a certified copy of the memorandum of the company, and if the said memorandum is not in one of the official languages of the Republic, a certified translation thereof in one of those languages;

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(b) a notice under section 170 in the prescribed form of the registered office and postal address of the company;'

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a notice under section 170 in the prescribed form of the registered office and postal address of the company;'

[18] For the same considerations as stated in *ISM INTER v MARALDO AND ANOTHER* 1983 (4) SA 112 (TPD) at 114E-F, the cases dealing with this issue under the previous Act, including those on which the parties rely, cannot be distinguished on the basis of the legislation only that was interpreted. To my mind the current Companies Act contains similar provisions regarding the registration and appointment of a registered office, or put differently, the current Companies Act does not contain provisions that can be said to materially affect the reasoning and ratio decidendi of the previous judgments to which I have been referred.

ISM INTER v MARALDO AND ANOTHER

1983 (4) SA 112

Companies Act contains

Companies Act does

ratio decidendi

[19] It is trite that at common law the residence of the defendant entrenches the jurisdiction of the relevant forum. (See *JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION* 1997 (3) SA 34 (W) at 37C-D; *BISONBOARD LTD v K BRAUN WOODWORKING MACHINERY (PTY) LTD* [1990] ZASCA 86; 1991 (1) SA 482 (A) at 487C).

JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION

BISONBOARD LTD v K BRAUN WOODWORKING MACHINERY (PTY) LTD

[1990] ZASCA 86

1991 (1) SA 482

[20] The question posed in this matter is simply whether a foreign company which has been duly registered as an external company in terms of the Companies Act and which conducts business in the Republic is resident in the Republic for the purposes of section 28(1) of the Supreme Court Act.

For the reasons that follow, I am of the opinion that a duly registered external company, conducting business in the Republic,

cannot be said to be resident in the Republic for purposes of section 28(1) of the Supreme Court Act, regardless that the cause of action (dispute) arises from the business activities of the external company in the Republic.

[20]

Companies Act

[21] It is efficacious to keep in mind that the Companies Act deliberately distinguishes between domestic and external companies. Reference to a company in the Act does not include a reference to an external company. The terms have different meanings and the

requirements and obligations pertaining a domestic company differs from the requirements and obligations of an external company. This was also the position under the previous Act. Admittedly the current Act contains provisions regarding external companies that the previous Act did not. That much is apparent by simply considering section 23. Several sections in the Companies Act deal with external companies, for example the obligation to furnish annual returns (section 33(2) and so forth). A detailed exposé on the different sections and the differences between the current Companies Act and previous Companies Act is, however, not necessary for purposes of this judgment. In *WISEMAN v ACE TABLE SOCCER (PTY) LTD* 1991

- (4) SA 171(W) at 176F – I, it was held that the purpose of registration of an external company under the previous Act, was to ensure that an external company, after complying with such procedures, will be on equal par with a South African incorporated company. That is also the purpose of registration of an external company under the present Act. That does not mean that an external company is resident in the Republic.

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1991

(4) SA 171

That is also the purpose of registration of an external company under the present Act. That does not mean that an external company is resident in the Republic.

[22] Section 23 requires that an external company continuously maintain at least one office in the Republic and register the address of its office, or its principal office, if it has more than one office. Section 322, of the previous Act, also required that an external company shall have in the Republic a registered office to which all communications and notices may be addressed and at which all process may be served. In essence, both require the same thing. As has consistently been held, the mere fact that an external company has a registered office or even branch offices and is conducting business in the Republic is not enough to make it resident in the Republic for the purposes of section 28(1) of the Supreme Court Act.

[23] In *JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION* supra, Streicher J, pointed out that the provisions regarding the keeping of official documents at the registered address of a domestic company do not apply to an external company. This is also the position in the (current) Companies Act. The Judge further held at 38H-39B that:

JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION

Companies Act. The

‘These provisions relating to external companies do not attract the inference that the Legislature intended to endow the registered

office of an external company with the quality of being the place to which the world can look as the legal home and administrative centre of the external company. In my view they indicate the opposite when compared with the provisions relating to the registered address of a domestic company.

These provisions relating to external companies do not attract the inference that the Legislature intended to endow the registered

office of an external company with the quality of being the place to which the world can look as the legal home and administrative centre of the external company. In my view they indicate the opposite when compared with the provisions relating to the registered address of a domestic company.

Moreover, considerations of commercial convenience and expediency militate against viewing the registered office of an external company as the residence of the external company. Should such registered office be deemed to be the residence of an external company, any peregrinus would be entitled to sue the external company in the Court in whose area of jurisdiction the external company's registered office in the Republic is situated, wherever the cause of action may have arisen. The Legislature could, in my view, not have intended

such a result. In the premises, in my view, an external company cannot be said to be resident at its registered office in terms of s 322 and 170 of the Companies Act.'

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such a result. In the premises, in my view, an external company cannot be said to be resident at its registered office in terms of s 322 and 170 of the Companies Act.'

s 322

s 170

Companies Act.'

The ratio is equally relevant to the current Companies Act.

Companies Act.

[24

DAIRY BOARD v JOHN T RENNIE & CO (PTY) LTD

1976 (3) SA 768

JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION

LEIBOWITZ T/A LEE FINANCE v MHLANA AND OTHERS

2006 (6) SA 180

[25] To this end, and as stated, the court in *SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD* 1982 (2) SA 739 (W), on which the respondent relies, also held that the mere fact that an external company has a registered office and branch office in the Republic (and conducts business in the Republic) does not constitute residence for the purpose of conferring jurisdiction on the Court. In that judgment however the court, as stated, held that the cause of action (the dispute) also needed to arise out of the business of the external company for it to be resident. This is also referred to as the *causa* qualification. The court followed a long line of cases with this finding. See *LUNT v BALMORAL DIAMOND MINING CO LTD* (1906) 10 HCG 58 at 59 and *APPLEBY (PTY) LTD v DUNDAS LTD* 1948 (2) SA 905 (E) at 909-910. The *SKJELBREDS* ratio was confirmed in *ISM INTER LTD v MARALDO AND ANOTHER*, *supra*. I cannot agree with this line of reasoning. I fail to understand why the mere fact that the cause of action arises out of the business activities of the external company will make it resident, whilst had the cause of action not arisen out of the business

activities of the company, it would not have been resident. I am fortified in my view in light of the finding by Harms JA in *TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD* [2006] ZASCA 28; 2006 (4) SA 177(SCA) at para 3:

SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD

causa

LUNT v BALMORAL DIAMOND MINING CO LTD

APPLEBY (PTY) LTD v DUNDAS LTD

ISM INTER LTD v MARALDO AND ANOTHER

[2006] ZASCA 28

2006 (4) SA 177

'In the present context, the difference between an arrest or attachment and a fundam jurisdictionem and one ad confirmandam jurisdictionem is of no consequence.¹ 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.'² With 'jurisdiction' is meant the power to adjudicate upon a particular case and to give effect to the judgment.'³

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1

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by itself will not do.'

2

With 'jurisdiction' is meant the power to adjudicate upon a particular case and to give effect to the judgment.'

3

To my mind the findings of the Supreme Court of appeal in *LEIBOWITZ T/A LEE FINANCE v MHLANA AND OTHERS* and *TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD*, read with the finding in the *JOSEPH* case (supra) settles the matter.

LEIBOWITZ T/A LEE FINANCE v MHLANA AND OTHERS

TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD

JOSEPH

[26] The decision in *SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD* supra, was considered by the Appeal Court and reversed, but the Court of Appeal, significantly, did not confirm the court's findings

with regards to this issue. That Court held that in light of its finding regarding others issues, that the appeal had to succeed and that it was therefore not necessary to deal with the specific point. (See *SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD* 1982 (2) SA 710(A) at p 729F - G.) From the afore-mentioned it is clear that the mere registration and continuous maintenance of an office in the Republic and conducting of business, does not in itself make the external company resident in the Republic. The fact that the cause of action (the dispute) arose from the business activities that the external company conducts in the Republic does not make it resident for purposes of section 28(1). It will merely serve as a jurisdictional ground at common law which, depending on whether it arose in the area of jurisdiction where the company is resident, may entitle the court to confirm the court's jurisdiction.

[26] The decision in

SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD

, was considered by the Appeal Court and reversed, but the Court of Appeal, significantly, did not confirm the court's findings

with regards to this issue. That Court held that in light of its finding regarding others issues, that the appeal had to succeed and that it was therefore not necessary to deal with the specific point. (See

1982 (2) SA 710(A) at p 729F - G.) From the afore-mentioned it is clear that the mere registration and continuous maintenance of an office in the Republic and conducting of business, does not in itself make the external company resident in the Republic. The fact that the cause of action (the dispute) arose from the business activities that the external company conducts in the Republic does not make it resident for purposes of section 28(1). It will merely serve as a jurisdictional ground at common law which, depending on whether it arose in the area of jurisdiction where the

1982 (2) SA 710

section 28(1).

is resident, may entitle the

to confirm the court's jurisdiction.

[27] It is necessary, notwithstanding my finding above, to deal with Mr Fischer's submission that Streicher J, when considering the matter in the JOSEPH case, supra, was apparently not referred to the dictum in SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD 1982

(2) SA 739(W). The Judge admittedly does not refer to the judgment. That does not mean that the Judge did not consider the judgment or the reasoning on which the judgment relies. In the JOSEPH judgment the case of ISM INTER LTD v MARALDO AND ANOTHER 1983 (4) SA 112(TPD), was thoroughly considered. In the ISM case the judgments in, inter alia, SKJELBREDS supra and APPLEBY (PTY) LTD v DUNDAS LTD 1948 (2) SA 905(E), with regards to the so-called 'cause of action qualification', were considered and discussed. Streicher J clearly considered the reasoning in the respective cases of SKJELBREDS and APPLEBY.

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APPLEBY

[28] I am satisfied that the applicants have therefore satisfied the requirement to prove that the Respondent is aperegrinusdefendant.

[28] I am satisfied that the applicants have therefore satisfied the requirement to prove that the Respondent is a defendant.

[29] The applicants must, either to confirm or found jurisdiction, show the existence of a prima facie cause of action against the defendant.As reiterated inSIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS[1998] ZASCA 79;1999 (1) SA 217(SCA) at 228C-D, this requirement is satisfied if:

[29] The applicants must, either to confirm or found jurisdiction, show the existence of a prima facie cause of action against the defendant.

As reiterated in

SIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS

[1998] ZASCA 79;1999 (1) SA 217(SCA) at 228C-D, this requirement is satisfied if:

[1998] ZASCA 79

1999 (1) SA 217

‘... 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 Portnet (Bouygues Offshore SA and Another Intervening)1998 (3) SA 861(SCA) at E 868B--H)’

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1998 (3) SA 861

(See alsoLONGMAN DISTILLERS LTD v DROP INN GROUP OF LIQUOR SUPERMARKETS (PTY) LTD[1990] ZASCA 39;1990 (2) SA 906(A) at 914E-F).

LONGMAN DISTILLERS LTD v DROP INN GROUP OF LIQUOR SUPERMARKETS (PTY) LTD

[1990] ZASCA 39

1990 (2) SA 906

[30] The respondent disputes that the applicants have satisfied this requirement, because it is alleged that the applicants rely on ‘so-called’ amendments and alterations to the contract and its pricing as basis for their cause of action. The respondent says that any amendments will be hit by the ‘non-variation’ clause (or so-calledShifrenprinciple), as the amendments and alterations were not in writing.

[30] The respondent disputes that the applicants have satisfied this requirement, because it is alleged that the applicants rely on ‘so-called’ amendments and alterations to the contract and its pricing as basis for their cause of action. The respondent says that any amendments will be hit by the ‘non-variation’ clause (or so-called

Shifren

principle), as the amendments and alterations were not in writing.

[31] I am satisfied that the applicants have passed the low threshold to satisfy this requirement. The papers show,prima facie, correspondence from the respondent regarding the amendment of orders and the pricing for drilling. Furthermore, the first and/or third applicant relies on separate oral agreements with the respondent. The respondent itself admits payments for the rental of equipment. It is clear that services were rendered. At the very least, it cannot be found if the evidence is assessedas a whole, that the applicants clearly have no action, or cannot succeed. The same applies for the intended claim for

rectification.

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as a whole, that the applicants clearly have no action, or cannot succeed. The same applies for the intended claim for rectification.

[32] The applicants also need to prove, in order to satisfy the third requirement, that the property which they seek to attach

- (a) is property in which the respondent has a beneficial interest;
- (b) that the property is within the Republic for purposes of confirming jurisdiction if the cause of action arose in the court's area of jurisdiction; or
- (c) that the property is within this court's area of jurisdiction if they seek to found jurisdiction.

[33] It is common cause between the parties that the property is not situated in the area of jurisdiction of this court, but that it is situated in the Republic. Although the respondent has not disclosed the exact location, it is common cause that the property was situated in the Northern Cape Province, where it would be utilised, when these proceedings were initiated. The respondent denied in its papers that it is the owner of the property. The evidence on a whole shows that, at the very least, the respondent has a beneficial interest in the property.

[34] The applicants must lastly prove that the cause of action arose in the court's area of jurisdiction for confirmation of jurisdiction. On the evidence as it stands it cannot be found that any of contracts on which the applicants rely, were concluded in this Court's area of jurisdiction. The respondent however admits that part of the contract was to be executed in the Free State Province. This is also supported by the invoices which were rendered. As was held in *ROBERTS CONSTRUCTION CO LTD v WILLCOX BROS (PTY) LTD* 1962 (4) SA 326(A), a High Court has jurisdiction in terms of a cause of action in terms of section 19(1)(a) of the Supreme Court Act when a material element of the cause of action falls in that court's jurisdiction, such as partial

performance of the contractual obligations in the area of jurisdiction of such court. This court will therefore have jurisdiction over the cause of action. As such a jurisdictional ground exists that can be confirmed to strengthen the court's jurisdiction. (See also *THOMAS v BMW SOUTH AFRICA (PTY) LTD* 1996

(2) SA 106(C).)

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THOMAS v BMW SOUTH AFRICA (PTY) LTD

1996

(2) SA 106(C).)

1996

(2) SA 106

[35] For these reasons I am satisfied that the applicants have met all the requirements for an order that the property of the respondent be attached *ad confirmandam jurisdictionem*.

[35] For these reasons I am satisfied that the applicants have met all the requirements for an order that the property of the respondent be attached

[36] In the result I make the following order:

The application succeeds;

An order is granted in terms of prayer 1 of the applicants Notice of Motion;

The attachment will lapse if the applicants fail to institute an action in this division against the respondent within 30 days after this order, the day of the order to be excluded and the last day to be included in calculation of the 30 day period; The respondent is ordered to pay the costs of the application, such costs to include the costs occasioned by the employment of two counsel.

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The respondent is ordered to pay the costs of the application, such costs to include the costs occasioned by the employment of two counsel.

SNELLENBURG, AJ

APPEARANCES: On behalf of the applicant:

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Adv AJR van Rhyn SC, assisted by

Adv P du P Greyling Eugene Attorneys,

Bloemfontein

On behalf of first respondent:

Adv PU Fischer,

Adv PU Fischer

Instructed by:

Neuhoff Attorneys,

NS/sp

1 Ghomeshi-Bozorg v Yousefi 1998 (1) SA 692(W), where a contrary view was held, it is, to that extent, wrong.

1998 (1) SA 692

2 Ewing McDonald & Co Ltd v M & M Products Co [1990] ZASCA 115; 1991 (1) SA 252(A) at 258D - G; Naylor v Jansen; Jansen v Naylor [2005] 4 All SA 26(SCA) in para [20]

[1990] ZASCA 115

1991 (1) SA 252

[2005] 4 All SA 26

3Steytler NO v Fitzgerald1911 AD 295at 346; Hugo v Wessels1987 (3) SA 837(A) at 849H; Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation)1987 (4) SA 883(A) at 886D - E.

1911 AD 295

1987 (3) SA 837

1987 (4) SA 883

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