

SOUTH AFRICA / JUDGMENT

Maschinen Frommer GMBH & co kg v Trisave Engineering & Machinery Supplies (PTY) limited (415/02) [2002] ZAWCHC 55; [2003] 1 All SA 453 (C); 2003 (6) SA 69 (C) (10 October 2002) [2002] ZAWCHC 55

COURT

Western Cape High Court, Cape Town

BEFORE

Van Reenen

CASE / FILE NUMBER

415/02

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IN THE HIGH COURT OF SOUTH AFRICA

Reportable

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:415/02

DATE:10-10-2002

In the matter between:

MASCHINEN FROMMER GmbH & CO KG

Plaintiff

and

TRISAVE ENGINEERING & MACHINERY SUPPLIES (PTY) LIMITED

Defendant

J U D G M E N T

VAN REENEN, J: The 4th Civil Chamber of the Koblenz High Court on 30 November 2000 ordered Trisave Engineering and Machinery Supplies (Pty) Ltd (the defendant) a company incorporated and trading in the Republic of South Africa, to pay Maschinen Frommer GmbH & Co KG, a company with a limited liability incorporated and trading in Germany, (the plaintiff) an amount of DM 51 500 plus interest at 5% per annum as from 13 February 1999.

The amount of DM 51 500 represents damages suffered by the plaintiff as a result of a breach by the defendant of an agreement concluded during November 1998, in terms whereof the defendant purchased from the plaintiff a Heidelberg Speedmaster printing machine Model 102 VP for an amount of DM 395 000 CIF Durban.

As the defendant failed to discharge the judgment debt, the plaintiff on 25 February 2002 issued a provisional sentence summons out of this Court in which it claimed payment of an amount of DM 51 500, alternatively, the Euro equivalent thereof together with interest thereon at 5% per annum as from 13 February 1999 to date of payment, on the following grounds set out in paragraph 2 of the summons:

"(i) During or about May 1999 and in the Koblenz High Court, Koblenz, Germany, the Plaintiff instituted an action against the Defendant based on a breach of contract committed by the Defendant.

(ii) The Koblenz High Court was a competent jurisdiction to hear and determine the Plaintiff's claim by virtue of the Defendant's submission to the jurisdiction of the said Court in terms of the contract on which the Plaintiff sued, alternatively the parties had at all material times intended that the Koblenz High Court would have jurisdiction to hear all claims arising from their contract, alternatively, by the conduct of its defence in the Koblenz High Court the Defendant submitted to the jurisdiction of the Court.

(iii) On 20 November 2000 the Koblenz High Court handed down a judgment in favour of the Plaintiff in the sum of DM 51 500 (FIFTY ONE THOUSAND AND FIVE HUNDRED DEUTSCHE MARKS), together with interest thereon at the rate of 5% per annum as from 13 February 1999.

(iv) The said judgment became final on 15 March 2001, after which date it was no longer appealable.

(v) The said judgment is not subject to an appeal, has not been rescinded, has not prescribed and is, according to German law, still an enforceable judgment. A certified copy of the judgment and a sworn translation thereof are annexed hereto marked 'A' and 'B' respectively.

(vi) The principal place of business of the Defendant is within the area of jurisdiction of this Honourable Court.

(vii) The Defendant has to date failed to pay the Plaintiff the amount of the aforesaid German judgment or any part thereof."

The defendant opposed the provisional sentence proceedings and in terms of the provisions of Rule 8(5), timeously filed an affidavit in which it set out the grounds on which it disputes liability of the plaintiff's claim and the latter, in turn, filed a replying affidavit.

Mr Gess, who represented the defendant, opposed the granting of provisional sentence on two grounds. The first was that the provisional sentence summons is defective for lack of authentication of the foreign judgment annexed to it. The second was that the Koblenz High Court did not have jurisdiction to hear and determine the action that the plaintiff had instituted

against the defendant because the latter had not received a copy of the general terms and conditions of sale that contained a choice of law clause (Clause VIII) and a submission to jurisdiction clause (Clause IX(2)) and accordingly;

a) German law did not apply to the parties' contract, and

b) the defendant had not submitted to the jurisdiction of the Koblenz High Court; that the plaintiff and the defendant had not intended that the Court should have jurisdiction to hear any claims against the latter; and that the defendant at all material times disputed that the Koblenz High Court had jurisdiction.

It is not in dispute that the judgment annexed to the provisional sentence summons has not been authenticated in accordance with the provisions of Rule 63(2) which requires that any document executed in any place outside the Republic of South Africa shall be deemed to be sufficiently authenticated for the purposes of use therein, if it is duly authenticated at such foreign place by certain designated functionaries. "Document" is in Rule 63(1) defined as meaning:

"Any deed, contract, power of attorney, affidavit or other writing, but does not include any affidavit or solemn or attested declaration purporting to have been made before an officer prescribed by section eight of the Justices of the Peace and Commissioners of Oaths Act, No 16 of 1963."

and, "authentication" has been defined as meaning, when applied to a document, the verification of any signature thereon.

Mr Melunsky who represented the plaintiff, contending that the *ejusdem generis* rule finds application, submitted that because the wide meaning of the concept "other writing" in the definition of the word "document" is restricted by the class or genus of words of limited meaning that precede it, a judgment of a foreign Court is not encompassed therein as it, in contradistinction to the other mentioned documents which are executed by natural and juristic persons, emanate from a court of law. Although that submission is superficially attractive, I prefer to deal with the objection to the absence of authentication on a different basis.

The rules relating to the authentication of a document executed in foreign countries have been designed to ensure that such documents are genuine before use can be made thereof in the Republic of South Africa. The prescribed formalities are not mandatory, and the genuineness of such documents may be proved on a balance of probabilities by means of direct or circumstantial evidence or both (See: *Chopra v Sparks Cinemas (Pty) Ltd & Another* 1973(2) SA 352 D&CLD at 358B-D; see also *Ex parte Holmes & Co (Pty) Ltd* 1939 NPD 301; *Friend v Friend* 1962(4) SA 115 (E)).

It is apparent from the summons that the application for provisional sentence is based on a judgment of the Koblenz High Court. Paragraph 2(v) of the summons specifically states that a certified copy of the judgment of that court, as well as a sworn translation thereof, have been annexed thereto.

The defendant in its opposing affidavit, whilst asserting that the provisional sentence summons did not comply with the provisions of Rule 8(3), because the document in which the choice of law and submission to jurisdiction clauses on which the plaintiff relies has not been annexed, did not challenge the genuineness of the judgment annexed to the provisional sentence summons. As already stated, Rule 8(5) pertinently requires a defendant to set out the grounds on which liability is disputed in his/her/its opposing affidavit.

Although provisional sentence proceedings are initiated by means of summons they, if opposed, proceed by means of the filing of opposing and replying affidavits. As in the case of ordinary proceedings (See: *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999(2) SA 279 (W) at 323G) such affidavits have the purpose, not only of placing evidence before the Court, but also of defining the issues between the parties. It appears to me to be axiomatic that where an averment in a provisional sentence summons is not challenged in the opposing affidavit, the correctness thereof is accepted.

I am in agreement with the submission made by Mr Melunsky, that it is inconceivable that if the judgment annexed to the provisional sentence summons had not been genuine, the defendant would have said so. The defendant in this matter did not only fail to challenge the genuineness of the annexed judgment, but in its opposing affidavit accepted that the judgment sued on is that of the Koblenz High Court in that it, in support of its defence, relies on excerpts therefrom. The following excerpt quoted by the defendant, in my view, affirms the genuineness of the judgment of the Koblenz High Court:

"I therefore humbly submit that the Koblenz High Court did not have jurisdiction to hear the action or grant the judgment on which this application for provisional sentence is based." (underlining provided)

The present one is not an instance where judgment was granted in the defendant's absence. On the contrary, it actively opposed the proceedings in the Koblenz High Court and, in all probability, has first-hand knowledge of its contents as, according to the papers, a copy thereof was served on its legal representatives in Germany on 12 December 2000.

As the plaintiff has succeeded in showing on a balance of probabilities, by means of evidence other than the authentication in terms of Rule 63(2), that the judgment of the Koblenz High Court annexed to the provisional sentence summons is genuine, the defendant's objection based on the non-compliance with the provisions thereof is devoid of any merit.

Corbett, CJ in *Jones v Krok* 1995(1) SA 677 (A) at 685B-G said that a judgment of a foreign court will be enforced by our courts provided:

"(i)that the Court which pronounced on the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence');

(ii)that the judgment is final and conclusive in its effect and has not become superannuated;

(iii)that the recognition and enforcement of the judgment by our courts would not be contrary to public policy;

(iv)that the judgment was not obtained by fraudulent means;

(v)that the judgment does not involve the enforcement of a penal or revenue law of a foreign state;

(vi)that enforcement of the judgment is not precluded by the provisions of the Protection of Business Act 99 of 1978 (as amended)."

The only one of the aforementioned requirements that is being challenged by the defendant is the international jurisdiction or competence of the Koblenz High Court.

A judgment of a foreign court sounding in money and granted against a natural person, will be recognised and enforced by South African courts if, firstly, the defendant was physically present within the state to which the foreign court belongs at the time of the commencement of the action; secondly, if at the time of the commencement of the action the defendant, although not physically present within such state, was either domiciled or resident there; and thirdly, the defendant has submitted to the jurisdiction of the foreign court. In the case of a juristic person the analogue of physical presence is the transaction of business (See: *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983(1) SA 1033 (W) at 1037H-1038C; *Purser v Sales*; *Purser and Another v Sales and Another* 2001(3) SA 445 (SCA) at 450J-451E).

As it is common cause that the defendant was not domiciled nor physically present in Germany at the time the plaintiff instituted action against the defendant in the Koblenz High Court, the international jurisdiction of that court, according to the principles of South African law could, in the instant case, be based only on a submission to its jurisdiction (See: *Purser v Sales*; *Purser and Another v Sales and Another* (supra) at 450J-451B). A submission can be express or tacit (See: *Standard Bank Ltd v Butlin* 1981(4) SA 158 (D) at 161H-162B).

It is now generally accepted that where a defendant in provisional sentence proceedings to enforce a judgment of a foreign court, challenges the international jurisdiction or competence of such a court, the onus thereanent rests on the plaintiff (*Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* (supra) at 1037C; *Zwyssig v Zwyssig* 1997(2) SA 467 (W) at 472C-F; *Erskine v Chinatex Oriental Trading Co* 2001(1) SA 817 (C) at 820D-I). Such an onus has to be discharged on a balance of probabilities (See: *Blanchard, Krasner & French v Evans* 2002(4) SA 144 (W) at 148G-I). The plaintiff relies on an express as well as a tacit submission to the jurisdiction of the Koblenz High Court on the part of the defendant.

The express submission is based on the terms of clause IX(2) of the plaintiff's general terms and conditions of sale which the plaintiff contends form part of the agreement of sale entered into between the plaintiff and the defendant as the German equivalent of the words "our general terms and conditions of sale apply" appear on a pro forma invoice the plaintiff sent to the defendant on 23 November 1998 in respect of the sale of the Heidelberg Speedmaster printing machine, which terms and conditions are printed on the reverse side of all its "official

documents". The concept "official documents" has not been elucidated.

The said clause, translated from German into English, provides as follows:

"IX(2)If the purchaser is a registered merchant, the exclusive venue (jurisdiction) for all lawsuits arising from contracts, including litigation relating to bills of exchange and cheques, is the Armtsgericht (AG) (=lower court). Neuwied/Rhein or the Landgericht (LG) (=high court) Linz/Rhein. However, we reserve the right to sue the purchaser in the court which has jurisdiction over his place of business."

The defendant's disavowal that the plaintiff's general terms and conditions of sale form part of the contract of sale between the plaintiff and the defendant, is based thereon that whilst it admits that it received the pro forma invoice of 23 November 1998, it did not receive a copy of the document embodying them and that it was unaware of the contents thereof.

Whilst a South African court called upon to enforce a foreign judgment is not permitted to go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law (See: *Jones v Krok* supra at 685E), it will adjudicate any jurisdictional fact necessary to establish international competency or jurisdiction (See: *Coluflandres Ltd v Scania Industrial Products Ltd* 1969(3) SA 551 (R) at 560F-G; *Morrisby-White v Morrisby-White* 1972(3) SA 222 (R) at 225H-226A; *Lawsa* (1st Reissue) Vol 2, paragraph 476). Accordingly, this Court is at liberty to enquire into whether the plaintiff's general terms and conditions of sale form part of the agreement between the plaintiff and the defendant.

That enquiry proceeds from the premise that the defendant does not deny that the German equivalent of the words "our general terms and conditions of sale apply" appeared on the pro forma invoice of 23 November 1998 and, furthermore, did not assert that its human functionaries had not seen or read them. Its case is that it had not received a copy thereof. The onus of showing, on a balance of probabilities, that the said terms and conditions form part of the agreement of sale between the plaintiff and the defendant clearly rests on the former.

In accordance with which system of law must it be determined whether or not, in the circumstances enumerated above, the plaintiff's general terms and conditions of sale form part of the contract of sale between the plaintiff and the defendant? It is axiomatic that until it is found that such terms and conditions do form part of the agreement of sale, the terms of the choice of law and the submission to jurisdiction clauses embodied therein, cannot have any influence on the enquiry.

It appears to be common cause that the real enquiry is whether the general terms and conditions of sale subsequently became part of the terms of the agreement of sale concluded on 20 November 1998. Logic dictates that whether that happened or not should be determined with reference to the proper law of the agreement of sale so that the necessity to invoke the putative proper law (See: *Lawsa* (1st Reissue) Vol 2, paragraphs 463 and 464) does not arise. In terms of South African law the *lex loci contractus* governs the nature, the obligations and the interpretation of a contract. The *locus contractus* is the place where the contract was entered

into, except if it is to be performed elsewhere, in which event the latter place is considered to be the locus contractus (See: Standard Bank of South Africa Limited v Efroiken and Newman 1924 AD 171 at 185).

In terms of the agreement of sale, the printing machine in question was sold CIF Durban. In a contract of that nature, the seller's obligation is performed by the delivery of the relevant documentation and not the actual delivery of the goods sold (See: Standard Bank of South Africa Limited v Efroiken (supra) at 190; Frank Wright (Pty) Ltd v Corticas "BCM" Ltd 1948(4) SA 456 (C) at 464; Siemens Ltd v Offshore Marine Engineering Ltd 1993(3) SA 913 (A) at 922 B-D). Where, as in the instant case, the agreement is silent as regards the place where delivery of the documents must be tendered and, absent evidence of a trade usage or course of business between the parties, the obligation is to deliver the documents at the buyer's place of business (See: Frank 10-10/9:57Wright /Wright (Pty) Ltd v Corticas "BCM" Ltd (supra) at 463) which in the instant case is Cape Town.

I accordingly incline to the view that the question whether the plaintiff's general terms and conditions of sale form part of the agreement of sale between the plaintiff and the defendant must be determined in accordance with South African law as the proper law of the contract of sale that was concluded on 20 November 1998.

As already stated, the defendant admits having received the pro forma invoice of 23 November 1998 and does not deny that its human functionaries had seen the German equivalent of the words "our general terms and conditions of sale apply". All that it denies is that it had received a copy thereof and that it was aware of the contents thereof. Whether that denial is sufficient to exclude the plaintiff's general terms and conditions of sale from forming part of the terms of the agreement of sale between the plaintiff and the defendant will depend on the outcome of the enquiry whether the plaintiff was reasonably entitled to have assumed that the defendant, by having on 1 December 1998 by facsimile transmission confirmed its order for the purchase of the particular printing machine, assented to the terms embodied in the plaintiff's general terms and conditions of sale or was prepared to be bound by them - without having read them - on the basis of the doctrine of quasi mutual assent. It will be so bound if the plaintiff did what was, judged objectively, reasonably sufficient to bring it to the attention of the defendant that such terms and conditions would apply to the agreement of sale (See: Durban's Water Wonderland (Pty) Ltd v Botha and Another 1999(1) SA 982 (SCA) at 991F-992A).

Although the German equivalent of the words "our general terms and conditions of sale apply" on the pro forma invoice of 23 November 1998 are not particularly prominent, the plaintiff, in my view, did take reasonably sufficient steps to bring the fact that such terms and conditions of sale applied to the notice of the defendant. The defendant did not put it in issue and, furthermore, did not endeavour to allege that it was not aware of the said phrase.

I accordingly incline to the view that the plaintiff's general terms and conditions of sale form part of the terms of the agreement of sale between the plaintiff and the defendant. The result is that in addition to clause IX(2), clause VIII - the latter whereof provides as follows:

"The law of the Federal Republic of Germany applies."

is applicable to the agreement of sale between the plaintiff and the defendant.

A consequence of that conclusion is that the question whether clauses VIII and IX(2) of the plaintiff's general terms and conditions of sale constitute an effective submission to the jurisdiction of the Koblenz High Court must be determined in accordance with the contractual proper law, namely German law.

The Koblenz High Court found that it enjoyed international competence or jurisdiction on two grounds. The first is "...a valid agreement on jurisdiction deriving from the choice of applicable law"

(clause VIII of the general terms and conditions of sale) and the second is "a valid prorogation of jurisdiction" by virtue of the fact that the parties to the agreement are competent traders (clause IX(2) of the general terms and conditions of sale). As the finding of the Koblenz High Court that it enjoys jurisdiction is being challenged and this Court is required to determine on the basis of German law whether that Court enjoyed international competence or not, it in my view, would be inappropriate to rely on that Court's findings as constituting proof of German law.

It is trite that a South African Court cannot take judicial notice of what the law of a foreign state is, unless that law can be ascertained readily and with sufficient certainty (section 1(1) of the Law of Evidence Amendment Act, No. 45 of 1988). Compliance with those requirements will be dependent upon access to authoritative sources of the relevant foreign law (See: *Harnischfeger Corporation and Another v Appleton and Another* 1993(4) SA 479 (W) at 485C-G (that part of the decision is not affected by the reversal of parts of the judgment on appeal)). Due to the limited authoritative sources of German law this Court has access to, it is not possible to ascertain readily and with sufficient certainty what the criteria are upon which courts in Germany exercise jurisdiction and accordingly, is not in a position to take judicial notice thereof.

Each aspect of foreign law is a factual question that has to be proved by someone with the necessary expertise (See: *Schlesinger v Commissioner for Inland Revenue* 1964(3) SA 389 (A) at 396G; *Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen* 1986(4) SA 865 (C) at 874F). Neither of the parties have considered it necessary to place any expert evidence before this Court so as to enable it to determine whether in terms of the law of Germany the provisions of clauses VIII and IX(2) of the general terms and conditions of sale, the Koblenz High Court has jurisdiction in respect of suits arising from the agreement of sale between the plaintiff and the defendant. In the absence of such evidence, one is driven to employ the contentious presumption that laws of foreign states are the same as that of the Republic of South Africa. Colman J said the following thereanent in *Bank of Lisbon v Optichem Kunsmis (Edms) Bpk* 1970(1) SA 447 (W) at 451A:

"The presumption is, as I see it, no more than an arbitrary rule of convenience. It is based, not upon a belief that the laws of all countries are the same, but upon a useful fiction which facilitates the resolution of disputes and which works no injustice because it is always open to an interested party to displace the presumption by proving that the relevant foreign law is, in truth, different from our own.

These considerations are, to my mind, no less appropriate to a matter which is governed in South Africa by a statute than to a matter governed by the common law."

Assuming that the law of Germany is the same as South African law, do clauses VIII and IX(2) of the plaintiff's general terms and conditions of sale constitute an effective submission to the international competence or jurisdiction of the Koblenz High Court in terms of South African law?

It is clear that in terms of South African law, a choice of proper law does not amount to a submission to the jurisdiction of such country's courts (See: *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd* 1977(3) SA 1020 (T) at 1033-4; *Reiss Engineering Co Ltd v Isamcor (Pty) Ltd* (supra) at 1040F).

Ex facie its provisions, the submission to jurisdiction embodied in clause IX(2) of the plaintiff's general terms and conditions of sale, is subject to the defendant, as purchaser, being a "competent trader" (page 19 of the record); "a qualified merchant" (page 57 of the record); and "a registered merchant" (page 83 of the record). Whilst according to the judgment of the Koblenz High Court such status on the part of the defendant appears to be a pre-requisite in German law for an effective submission to jurisdiction, there is no similar requirement in South African law. What accordingly has to be done is to ascertain what the plaintiff and the defendant intended thereby and to give effect thereto (See: *Cape Provincial Administration v Clifford Harris (Pty) Ltd* 1997(1) SA 439 (A) at 445G-H).

Although the first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties, it may transpire from the context of the words used, their interrelation and the nature of the transaction, as it appears from the entire contract, that they are used in an exceptional or technical sense and not in their popular everyday meanings, in which event that sense is taken to be the grammatical and ordinary meaning (See: *Sassoon Confirming & Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974(1) SA 641 (A) at 646B-D; *Polysius v Transvaal Alloys and Another* 1983(2) SA 630 (W) at 643E-644H).

It is clear from the context that the concept "a registered merchant" has been used by the parties in the exceptional or technical sense, appropriate to agreements of purchase and sale in German law. In the absence of evidence of what that sense is, it is not possible with the aid of the canons of construction applicable to South African law, to determine whether the jurisdictional fact required for the provisions of clause IX(2) to become operative, namely that the defendant is a "registered merchant", has been shown to be present or not, failing which, it is not possible to determine whether the Koblenz High Court enjoyed international competence or jurisdiction on the basis of an express submission.

As the plaintiff, in my view, has failed to show what the meaning of the concept "a registered merchant" in clause IX(2) of the general terms and conditions of sale is, it cannot be determined whether that jurisdictional requirement, which is essential for the provisions of clause IX(2) to become operative, existed or not. In the premises the plaintiff, in my view, has, on the papers before this Court, failed to discharge the onus of showing that the Koblenz High Court enjoyed international competence or jurisdiction in terms of an express submission to jurisdiction by the defendant.

Has the plaintiff succeeded in showing a tacit submission to jurisdiction?

The plaintiff, whilst conceding that the defendant contested the jurisdiction of the Koblenz High Court, contends that it did not do so immediately but, as a first step in defending the action, sought to be allowed to deposit a guarantee to avoid execution of any judgment that may be granted against it. The defendant disputes that it tacitly submitted to the jurisdiction of the Koblenz High Court and avers that despite the fact that it raised a further substantive defence to its jurisdiction, it at all times persisted with its plea that it did not have jurisdiction.

The plaintiff's assertion that the defendant, as a first step in defending the action sought to be allowed to deposit a guarantee, is not factually accurate. Its lawyers in their letter of 19 September 1999 advised the plaintiff's lawyers that they wished to bring applications for the claim to be dismissed; that the plaintiff be ordered to pay the costs of the action; and that the defendant be allowed to deposit a guarantee as a precaution in the event of its defence failing in whole or in part. There appears to be a dispute about the juncture when the defendant raised the lack of jurisdiction of the Koblenz High Court. That dispute cannot be resolved on the papers as it has not been fully ventilated.

C F Forsyth: Private International Law, 3rd Ed at 269 states that there are no decided cases in which submission by conduct has been accepted or rejected as a means of conferring international competence on a foreign court which it would otherwise not possess. Taking guidance from matters of internal competence, where submission by conduct is not readily inferred, but it is required that the defendant's conduct "must be of such a nature that the Court is able to say that it is consistent only with acquiescence" (per Vieyra, AJ in *Du Preez v Philip-King* 1963(1) SA 801 (W) at 803C) he submits that courts should exercise caution and not find that there has been a submission to jurisdiction unless the parties have clearly accepted the foreign court's jurisdiction e.g. where a defendant pleads to the merits without contesting a court's jurisdiction. The learned author, at page 370, points out that in terms of the provisions of section 1E(1)(a) and (2) of the Protection of Businesses Act, No 99 of 1978, appearance before a foreign court does not amount to submission if an appearance to defend was entered for the purpose of, inter alia, contesting the jurisdiction of the court and expressed the following view:

"If a defendant wishes not to submit, then his course of action is clear: on the rejection of his special plea to the jurisdiction, he must have nothing more to do with the foreign court. He cannot hunt with the hounds and run with the hares, i.e. defend the action in the foreign court, intending to abide by the decision if he wins but raise the court's lack of jurisdiction if he loses."

That view may have merit in a procedural regime where a plea of lack of jurisdiction is adjudicated in limine litis and prior to the adjudication of any remaining issues. Judging from the court's reasons for judgment, that does not appear to have happened in the trial before the Koblenz High Court. Accordingly, the fact that the defendant contested another issue before the Court, in my view, is not susceptible of being construed as a clear acceptance of its jurisdiction. If, as Conradie, J (as he then was) stated in *Supercat Incorporated v Two Oceans Marine CC* 2001(4) SA 33 (C) at 32F, that the enquiry into whether there has been submission by conduct concerns a defendant's state of mind as evidenced by his/her/its conduct, no facts have been put forward by the plaintiff to refute the defendant's assertion that it at all times persisted with a plea that the Koblenz High Court did not have jurisdiction.

In view of the foregoing, I incline to the view that the plaintiff has, on the papers before this Court, failed to discharge the onus of showing that the defendant tacitly consented to the jurisdiction of the Koblenz High Court.

In the premises the application for provisional sentence is refused with costs.

The defendant is given leave to file a plea to the summons within 14 days of the date of this judgment.

VAN REENEN, J

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