

SOUTH AFRICA / JUDGMENT

Van der Walt v Esprit Family Trust and Others (M372/15) [2016] ZANWHC 75 (15 December 2016)

[2016] ZANWHC 75

COURT

North West High Court, Mafikeng

BEFORE

A M Kgoele

CASE / FILE NUMBER

M372/15

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IN

THE NORTH WEST HIGH COURT

MAHIKENG

CASE

NO.: M372/15

In

the matter between:

LENE
VAN DER
WALT Applicant
and
ESPRIT
FAMILY
TRUST 1st
Respondent
FARE
FAMILY
TRUST 2nd
Respondent
PETRUS
JOHANNES VAN DER WALT 3rd
Respondent
DATE

OF HEARING :

27
October 2016
DATE

OF JUDGMENT : 15 December 2016
FOR

THE APPLICANT : Adv. J.H.F. Pistor SC
FOR

THE RESPONDENT : Adv. J.F. Pretorius

JUDGMENT

KGOELE J:

A.

INTRODUCTION

- [1] On 17th September 2015 the respondents (Applicants in the main application) applied on notice of motion and under case number M372/15, to this Court for the payment of an amount of R240,203.01 plus interest and costs pursuant to an alleged warranty breach by the applicant contained in a written agreement in terms of which the respondent (the current applicant) in that application sold her shares in a Company to them. I refer herein to that application as the “Main Application”
- [2] The applicants in the Main Application are the respondents in the application serving before this Court (the rescission application) and the applicant in the rescission application were the respondent in the main application. For the sake of convenience I will refer herein to the parties as applicants and respondents in this rescission application. It is also not in dispute that the applicant in the rescission application at all relevant times to the main application resided in Australia and that she is a peregrini. The factual background that led to this alleged breach of warranty will not be repeated in this judgment to avoid prolixity and furthermore are irrelevant in the consideration of this application.
- [3] Since the launching of the main application in September 2015, a number of interlocutory applications were launched. The rescission application was launched also interlocutory to the main application. The respondents oppose the relief sought in this rescission application.
- [4] The rescission application was prompted by the fact that the respondents had on the 7th December 2015, whilst the main application was still pending in this Court, filed an ex-parte application for an order that a certain immovable property belonging to the applicant and situated in Potchefstroom be attached ad confirmadum jurisdictionem.

[5] On 10th December 2015 Djaje AJ granted an order for the attachment of the said property ad confirmandum jurisdictionem and subsequent thereto (on 14 December 2015) the said property was so attached. During March 2016 applicant then filed an application in terms of Rule 42(1) of the Rules of Court (the Rules) for the rescission of the said order and for the setting aside of the attachment. It is this application that is the subject of this

judgment.

[6] The applicant in her notice of motion sought the following prayers:-

“1. That the order of 10th December 2015 be rescinded;

2. That the attachment in terms of the order of 10th December 2015 be set aside”.

[7] The applicant further indicated that the application is launched in terms of Rule 42 (1) of the Rules, alternatively, common law. The grounds for the rescission are that the attachment order was granted erroneously because of the following reasons:-

The application was launched in terms of Section 19 of the Supreme Court Act 59 of 1959 (the Old Act) which was repealed on the 23rd August 2013 by the Superior Courts Act 10 of 2013 (the new Act); The Section 19 application was launched after the institution of the main application whereas it ought to be launched before instituting an action”.

B. THE LAW

[8] The law that deals with rescission of judgment is trite. An order is erroneously granted if it was legally incompetent for the Court to have made such an order; if there was an irregularity in the proceedings or if the Court was unaware of facts, if known to it, would have precluded it from a procedural point of view from making the order. See: Harms, Civil Procedure in the Superior Courts B – 301.

[9] The difference between an application ad confirmandam jurisdictionem and an application ad fundandam jurisdiction is also trite and was dealt with as follows by Harms, in his book “Civil Procedure in the Superior Courts at page A-29 paragraph A4-20”:

“In order to satisfy the doctrine of effectiveness it may be necessary for a plaintiff to attach the goods of the defendant in order to found or to confirm jurisdiction.

An attachment to found jurisdiction is in principle necessary if the court has no jurisdiction over both the cause and the person of the defendant.

An attachment to confirm jurisdiction presupposes that the court has jurisdiction over the cause but lacks jurisdiction over the person of the defendant”.

[10] It is also prudent to quote the following sections upfront as they also forms the matrix of the issues before Court. Section 19

(1) (c) of the Old Act provides:

“(c) Subject to the provisions of section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act No. 105 of 1983), any High Court may—

(i) issue an order for attachment of property or arrest of a person to confirm jurisdiction or order the arrest suspectus de fuga also where the property or person concerned is outside its area of jurisdiction but within the Republic: Provided that the cause of action arose within its area of jurisdiction; and

(ii) where the plaintiff is resident or domiciled within its area of jurisdiction, but the cause of action arose outside its area of jurisdiction and the property or person concerned is outside its area of jurisdiction, issue an order for attachment of property or arrest of a person to found jurisdiction regardless of where in the Republic the property or person is situated.”

[11] Section 21 of the New Act provides (in so far as relevant) as follows:

“21. Persons over whom and matters in relation to which Divisions have jurisdiction

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—

(a) to hear and determine appeals.....;

(b) to review proceedings of all such Courts;

(c)

(2)

(3) Subject to section 28....., any Division may issue an order for attachment of property to confirm jurisdiction.”

[12] During the submissions in Court both Counsel dealt with their arguments under the following headings:-

C. EX-PARTE APPLICATION GRANTED ERRONEOUSLY

[13] Counsel for the applicant submitted that the ex parte application was erroneously launched in terms of Section 19 of the “The Old Act”, which Act was repealed on 23 August 2013 by the Superior Courts Act, 10 of 2013 (“the new Act”).

[14] The applicant’s Counsel further submitted that reference to an old Act and the section thereof that was repealed is fatal to the ex-parte application granted by the Court as per Djaje AJ. He reasoned that if one refers to a statutory provision that does not exist at all, then there is no cause of action. This is unlike referring to a wrong section as the issue become relaxable.

- [15] According to him the situation is worsened by the fact that the respondents in their papers indicated that Djaje AJ was made aware of this anomaly but nevertheless granted the order using the same sections and wording of the old Act. His argument is that the words not included by the legislature in the New Act “within or outside” are expressly excluded and reference or inclusion by the Court of these words in the attachment order is fatal.
- [16] The applicant’s Counsel, unlike in the other grounds relied upon, did not refer this Court to any relevant authorities or case law that supports his arguments in this regards. This clearly demonstrates that from its inception this was not a strong ground in favour of the applicant. On the other hand the respondents put forward strong arguments in their favour to the effect that the fact that reliance was initially placed on the provisions of the Old Act could not have caused the ex-parte application and the order itself to have been made erroneously.
- [17] Advocate Pistor SC submitted on behalf of the respondents that it is clear that section 21(3) of the New Act still provides for the attachment of the property in order to confirm jurisdiction. The arguments that deals with the words “outside jurisdiction” that were submitted by Advocate Pistor SC on behalf of the respondents hereunder applies equally to this heading and also serve as a basis for my finding that this ground of rescission by the applicant does not have merit. They will be dealt with more fully below under the heading of jurisdiction.
- [18] In developing this argument respondent’s Counsel Advocate Pistor SC submitted that the interpretation of the respondents is that the term “any Division” in the new section 21(3) must be understood to mean “any Division with jurisdiction as contemplated in sub-section (1) of the New Act”.
- [19] To bolster his argument Adv. Pistor SC submitted that on the 23rd November 2007, and by virtue of the case of Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, third Party) 2008 (3) SA 355 (SCA), the common law Rule that a person may be arrested in order to confirm jurisdiction was abolished. However, the second section 19(1)(c) remained on the statutes book and thus continued to provide the statutory machinery for attachments of property to confirm jurisdiction in suitable cases even if the property were to be situated outside the jurisdiction of a specific Court.
- [20] He submitted further that Section 21(3) of the New Act constitutes the Legislator’s implementation of the ruling in the Bid-case relating to arrest. However, the legislator did not retain the provisions in Section 19 (1) (c) relating to the matters referred to in (a) and (c) as seen in the previous paragraph wherein the section has been quoted. The latter aspects were not criticised in the Bid-judgment and it is not clear from the wording of the section as to whether the Legislature had intended to abolish them together with the provision relating to arrest.

[21] In such event (i.e. where the Act is not clear and unambiguous) Advocate Pistor SC argued, the presumption that the legislator does not intend to alter or modify the existing law more than is necessary, has to find application. The presumption still finds

application where the existing law is not harmonious with the spirit, purport or objects of the Bill of Rights.

[22] I fully agree with Advocate Pistor SC that there is no indication, whether express or by necessary implication, in the New Act to justify an interpretation that the legislature intended in the said section 21(3) to abolish the practice implemented by our Courts over some 15 years pursuant to and in terms of the provisions of Section 19(1)(c) of the Old Act, namely that they may direct the attachment to confirm jurisdiction of property which is situated outside the area of jurisdiction of the specific Court provided that the Court has jurisdiction in the main matter.

[23] The argument advanced by Advocate Pistor SC that it must therefore, be accepted that the legislator did not intend to terminate such practice is in my view sound. In any event, if it were (by enacting Section 21 of the new Act) to be the intention of the Legislator to forbid such attachments, it could have said so in no uncertain terms. In these circumstances, it is furthermore appropriate to conclude that the law as it had been in existence at the time when Section 21 of the New Act came into force still remains with regard to such attachments and consequently that the present attachment order and the subsequent attachment of the immovable property in Potchefstroom is in order.

[24] I fully agree with Advocate Pistor SC again on the proposition he made that should section 21(3) of the New Act not be interpreted as tendered by the respondents herein, it shall have the outrageous result that although this Court (Mahikeng) has jurisdiction *ex contractu* in the main application, the Court of Gauteng, Pretoria, will then have to be approached for an attachment order of the property to confirm the jurisdiction of this Court (Mahikeng) to adjudicate the matter. Clearly this seems to be absurd. One division of the High Court should not order attachments to confirm the jurisdiction of another division of the High Court. Each division of the High Court should confirm its own jurisdiction.

[25] The only logical conclusion therefore is that it was the intention of the legislator in the new Act to allow (in terms of section 21(3)) the very same division of the High Court that already has jurisdiction (in terms of section 21(1)) to issue an attachment order to confirm its own jurisdiction.

[26] I once more fully agree with Adv. Pistor SC that the arguments that the order as per Djaje AJ is erroneous by the fact that the order refer to the old section and Act and is worded exactly the same as the old Act by the using of the words amongst others “outside its jurisdiction” does not assist the applicant in any manner. The reasoning behind this can be found in the quotation in the case of Funds trust (Pty) Ltd (in liquidation) v Van Deventer 1997 (1) SA 710 (A) at page 725 to 726 the following was said:-

“It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply.....”

[27] The remarks above applies equally in our matter, whereas here, the relevant provisions of the Old Act have been replaced with similar provisions of the New Act and the facts pleaded, make it clear that the applicant is entitled to an order in terms of the New Act, the grant of an order in terms of the New Act cannot be said to be erroneous.

[28] In its answering affidavit the respondents indicated that at the time of the hearing of the ex-parte application Djaje AJ was informed of the fact that the old Act had been repealed and that the order is sought in terms of the new Section 21(3). The averments could not be disputed by the applicant in their replying affidavit. It therefore appears

that the Court was fully aware of the new Act and as a result the reference to the old Act in such circumstances and as it will appear more clearer later in this judgment does not justify a conclusion that the order was erroneously granted.

[29] Consequently, reliance by the applicant on this ground does not have merit at all and is bound to be dismissed.

JURISDICTION

No jurisdiction in the main application

[30] The grounds relied upon by the application in support of the issue of jurisdiction is three legged according to the submissions made by applicant's Counsel. As its first leg under jurisdiction, the applicant submitted as a ground that she relied upon that the attachment order could not have been issued since the Court did not have jurisdiction in the main application.

[31] Counsel for the applicant argued that the deponent to the answering affidavit in both the postponement and rescission applications seems to suggest that, because the attachment

order was granted in terms of an application to confirm jurisdiction (ad confirmandam jurisdictionem) and not an application to found jurisdiction (ad fundandam jurisdictionem), the Court always had jurisdiction to hear the matter without more but what is not explained by the deponent is why, if he is correct, the application ad confirmandam jurisdictionem was launched by the applicant if it was seemingly not required.

[32] To counter this argument the respondents' Counsel on the other hand submitted that the respondents' cause of action in the main application is based on contract. Ex facie the relevant contract the last two parties who signed same did sign on 31st May 2012 at Rustenburg. There is no evidence in the present application to put the latter fact in dispute and a submission that same is in dispute cannot be based on the available evidence.

[33] The respondents' Counsel further argued that a Court has jurisdiction in respect of a cause of action based on contract if inter alia the contract has been concluded within the area of jurisdiction of that Court or where performance in terms of the contract has to be made within such area of jurisdiction. He referred the Court to the case of *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* [1990] ZASCA 86; 1991 (1) SA 482(A) at 487B wherein the principle was re-affirmed as follows:

"In regard to the connecting factors or rationes jurisdictionis recognised by our common law, a convenient starting point is the classic statement of De Villiers CJ in Einwald v The German West African Company (1887) 5 SC 86 at 91:

'What then are the grounds upon which the jurisdiction of this Court can be exercised, in respect of any contract over any defendant without his consent, express or implied? The grounds are threefold; viz by virtue of the defendant's domicile being here, by virtue of the contract either having been entered into here or having to be performed here, and by virtue of the subject matter in an action in rem being situated in this Colony.' (His emphasis).

[34] Advocate Pistor SC emphasized the fact that when the latter principle relating to jurisdiction is to be applied to the facts of the present case, it is clear that this Court has jurisdiction in respect of the cause of action in the main application because inter alia of the following facts:

- (a) In casu the last party signed the contract in Rustenburg. Therefore, the contract has been concluded within the area of jurisdiction of this Court and therefore has jurisdiction in respect of the dispute flowing from the contract.
- (b) Performance in terms of the contract was to take place within the area of jurisdiction of this Court.
- (c) The alleged breach of contract was committed in Rustenburg and thus within the area of jurisdiction of this Court.
- (d) The claim regarding the outstanding payments of the Municipal rates will have to be considered with regard to the averments of the Trustees and perhaps also of the relevant Municipality in Rustenburg, therefore within the area of jurisdiction of this Court.

[35] According to him the Court therefore has jurisdiction in respect of the cause of action relied on in the main application and this Court was therefore entitled to consider the attachment application and to grant an order in respect thereof.

[36] In analysing this ground I took into consideration the fact that it appears to be settled law that where an attachment application is made in order not to found jurisdiction, but to confirm jurisdiction, the Court which grants such application must have jurisdiction in respect of the cause of action in the Main Application. Indeed, where a Court has jurisdiction by virtue of the provisions of a contract, an applicant cannot apply for attachment ad fundandum jurisdictionem since the Court already has jurisdiction. In such

event the applicant may apply for attachment ad confirmandum only.

[37] In LAWSA volume 11, 2nd Edition paragraph 552 this issue is dealt with as follows:

“Where the defendant peregrine is not resident anywhere in South Africa (and is thus a “foreign peregrine”), the incola plaintiff is allowed to effect an attachment of property in order to confer jurisdiction on the relevant court which it might otherwise not have had. The plaintiff incola must moreover procure an attachment of property even where the court already has jurisdiction, for example on the basis that a contract between the parties was entered into within its area, in which case the attachment would be, not to found, but to confirm jurisdiction.” [My emphasis]

[38] In the case which the applicant’s Counsel referred this Court to of Ewing McDonald and Co Ltd v M & M Products [1990] ZASCA 115; 1991 (1) SA 252 (A) the Appellate Division dealt with the difference between to find and to confirm jurisdiction as follows:

“The cause would thus arise, again according to Viljoen if it could be said to have done so according to the common law. At common law a ratio jurisdictionis alone would not have vested that Court with jurisdiction to try the action. The Court could have been so vested as a matter of course only if the defendant happened to be domiciled within its area; in all other cases his arrest or the attachment of his property would have been a precondition for jurisdiction. ... The modern distinction between attachments ad fundandam and attachments ad confirmandam jurisdictionem was of no consequence to the common law. And because the Court's jurisdiction was essentially territorial the property attached had to be found within the area of jurisdiction of the Court.”

“The appellant also advanced an alternative argument founded on the distinction between an attachment which is ad confirmandam as opposed to one that is ad fundandam jurisdictionem. By common consent the attachment in this case was ad confirmandam jurisdictionem because the agreement was to be implemented in Johannesburg. Accordingly, so it was submitted, the attachment should be sanctioned, since the existing ratio jurisdictionis provided the necessary nexus between situs and suit. But of course, if that were the only link required to vest a Court with jurisdiction, attachment or arrest would not have been a requirement at all. And that has never been the law. The alternative argument accepts the proposition that an attachment or arrest is mandatory whenever the defendant is a foreign peregrinus.” [emphasis added]

[39] It is evident from the ratios quoted above that a recognised ratio jurisdictionis by itself will not be sufficient to afford the Court the required jurisdiction in a matter where a foreign peregrinus is involved. It appears that the respondents have also come to this conclusion (despite what is alleged in their affidavit) that is why they launched this belated application to find / confirm jurisdiction.

[40] From the respondents founding affidavit in the ex parte application it appears that they contend that the cause of action, i.e. the alleged breach of the purchase agreement, arose within the area of jurisdiction of the Court. Significantly, a similar allegation is not to be found in the respondents’ founding affidavit in the main application.

- [41] Support of this principle can also be found in the case of *Tedecom Electrical Engineering Services (Pty) Ltd v Berriman* 1982 (1) SA 520 (W) wherein the following was held:-

“..... The very requirement of arrest or attachment where the defendant is a peregrinus shows that jurisdiction does not come about until the arrest or attachment is made”

- [42] On the same breath the respondents seem to be approbating and reprobating at the same time. This is shown in paragraph 28 of their answering affidavit which is found in paginated page 68 of the rescission application which is couched as follows:-

“The matter of the attachment to confirm jurisdiction is herewith placed and ready for argument in front of this Honourable Court. The respondent can therefore not argue that she could not be heard in this matter. The purpose of the attachment is firstly to confirm jurisdiction where the respondent is not a resident of the RSA and secondly to ensure compliance with any future order of this Court against the respondent. The confirmation of jurisdiction in casu is clearly exactly what the legislator had in mind in so far as this Honourable Court has, by way of the attachment, jurisdiction to hear this matter, whereas the respondent in her own application denies such jurisdiction. This Court should at the hearing of the main application decide for itself if it has jurisdiction in this matter and until such time as the hearing in the main application takes place, the attachment of the respondent’s property will confirm this Honourable Court’s jurisdiction.

- [43] Accepting for the moment that the cause of action did arise within the Court’s jurisdiction (which fact I do not find), it is evident from the authorities referred to above that a plaintiff (or applicant) is still required to apply for a confirmation of the Court’s jurisdiction. Without such an order, the Court will not be clothed with the required jurisdiction to adjudicate the matter.

- [44] I fully agree with the applicant’s Counsel that the case of *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) where the Appellate Division was tasked to deal with a very similar set of facts is on point with the facts in our matter. In that matter the subject contract was concluded in Johannesburg but the defendant was a foreign peregrinus. The honourable Appeal Court Judge Ogilvie Thompson, in the majority judgment, held as follows:

“At the outset, one or two preliminary matters must, I think, be premised. First, it is, I consider, beyond doubt that, although the contract giving rise to this litigation was concluded in the Transvaal, an attachment was essential in order to found or confirm jurisdiction against the peregrine defendant. In this connection, I agree with the Court a quo that the law is correctly set out by Herbstein and van Winsen, Civil Practice, 2nd ed., p. 704, in the following terms, viz.:

‘Even if the Court has jurisdiction upon one or other of the common law grounds it is still necessary for an incola or peregrine plaintiff to attach the property or person of a peregrine defendant to confirm or strengthen the jurisdiction already possessed by the Court . . . In accordance with this practice the Court has held that attachment is necessary even if the contract was made and is to be performed within the jurisdiction of the Court.’” [emphasis added]

[45] In the judgment of the case of Ewing McDonald referred to above the Court also dealt with a contract concluded within the jurisdiction of the Court with a foreign peregrinus. Nienaber AJA held as follows:

“Notwithstanding this ratio jurisdiction is the appellant correctly thought it necessary to attach property of the respondent in order to vest the Witwatersrand Local Division with jurisdiction to try the contemplated action.”

“But before elaborating on it and in order to put the argument into perspective, it may be helpful briefly to recapitulate the grounds, apart from voluntary submission, on which a Division of the Supreme Court according to current law and practice will assume jurisdiction in respect of claims sounding in money.

- (a) Where the plaintiff (or the applicant) is an incola and the defendant (or the respondent) is a foreign peregrinus (ie a peregrinus of the country as a whole) the arrest of the defendant or the attachment of his property is essential. Since a recognised ratio jurisdictionis by itself will not do it is immaterial whether such arrest or attachment is one ad fundandam jurisdictionem (where there is no other recognised ground of jurisdiction) or ad confirmandam jurisdictionem (where there is).”

“While effectiveness may be the rationale for jurisdiction, it is not necessarily the criterion for its existence. It is true that

effectiveness is, as Potgieter JA said in *Thermo Radiant ...* 'the basic principle of jurisdiction in our law'. (See, too, *Hugo v Wessels* 1987 (3) SA 837 (A) at 849J; 855G - I.) But it is as true that '... effectiveness does not per se confer jurisdiction on a Court' (per Viljoen JA in *Veneta Mineraria SpA v Carolina Collieries (Pty) Ltd (in Liquidation)* (supra at 891C)). According to Viljoen JA, in the judgment referred to, at 893F:

'The crucial question that presents itself is: what jurisdiction does a Supreme Court in South African law possess? A Court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit but also of giving effect to its judgment.'

A Court will have the power 'of taking cognisance of the suit' if the relevant cause arises within its area of jurisdiction. The cause would thus arise, again according to Viljoen JA in the same judgment at 893G - J (following Innes ACJ in *The Owners, Master and Crew of the SS 'Humber' v The Owners and Master of the SS 'Answald'* 1912 AD 546 at 554), if it could be said to have done so according to the common law. At common law a ratio jurisdictionis alone would not have vested that Court with jurisdiction to try the action. The Court could have been so vested as a matter of course only if the defendant happened to be domiciled within its area; in all other cases his arrest or the attachment of his property would have been a precondition for jurisdiction. ... The modern distinction between attachments ad fundandam and attachments ad confirmandam jurisdictionem was of no consequence to the common law. And because the Court's jurisdiction was essentially territorial the property attached had to be found within the area of jurisdiction of the Court.” [My emphasis]

[46] The aforementioned principle was again approved by the Supreme Court of Appeal by Harms JA in *Tsung v Industrial Development Corporation of SA Ltd*

[2006] ZASCA 28; 2006 (4) SA 177 (SCA), where he held:

“[3] In the present context, the difference between an arrest or attachment ad fundandam jurisdictionem and one ad confirmandam jurisdictionem 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.' With 'jurisdiction' is meant the power to adjudicate upon a particular case and to give effect to the judgment.” [My emphasis]

[47] I come to the conclusion that as far as the submissions on this leg or arguments that deal with the issue of jurisdiction, the applicant's submissions were convincingly sound and meritorious. It suffices to mention that the applicant does not rely or intent to rely on a submission to jurisdiction by the applicant. However, as indicated above, the applicant's

submission on this ground does not end here. There is a second leg that she also relies heavily on.

Ex Parte to be made before application commenced

[48] This brings me to deal with the second leg of this ground that relates to jurisdiction which is to the effect that Section 19 application (attachment to confirm) was launched after the institution of the main application when it ought to have been launched before instituting the action.

[49] A further question which requires consideration in this matter is when a plaintiff or applicant is required to obtain an order to find or confirm jurisdiction.

[50] The applicant's Counsel submitted that premised on the principle that a Court will not have jurisdiction to entertain a matter where the defendant is a foreign peregrinus before an attachment to find or confirm jurisdiction is made, despite the fact that another ratio jurisdictionem exists, as enunciated in *Thermo Radiant* case quoted above and confirmed by the Supreme Court of Appeal, the Court in this matter did not have jurisdiction at the time the main application was issued.

[51] He relied on the case of *Doctor For Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) on this proposition wherein the Constitutional Court confirmed the well-established principle that the time to determine a Court's jurisdiction is at the time the action or application is instituted or commenced and Justice Ngcobo held as follows in this regard:

“The question whether this Court has jurisdiction must be determined as at the time when the present proceedings were instituted and not at the time when the Court considers the matter. The crucial time for determining whether a court has jurisdiction is when the proceedings commenced.”

[52] He further submitted that in the aforementioned judgment Justice Ngcobo approved the following, which was held in *Thermo Radiant*:

“It was submitted to us that the crucial time when an asset should be in existence is the time of attachment but that the continued existence until after judgment of that asset is unnecessary. In order to support this submission it was suggested that if, for instance, a horse is attached which may die at any time before judgment, that in such a case the Court in any event cannot give an effective judgment. In my view the answer to that suggestion is that the crucial time for determining the jurisdiction of a court to entertain an action is the time of the commencement of the action. Jurisdiction having once been established at such time, it continues to exist to the end of the action even though the ground upon which the jurisdiction was established ceases to exist.” [His emphasis]

[53] According to him on any interpretation, it is clear that the Court did not have jurisdiction when the main application was instituted in September

2015. Premised on the aforementioned authorities, such a lack of jurisdiction cannot be remedied by an order to confirm jurisdiction after the institution of the application. For this reason alone, the attachment order should be set aside.

[54] The respondents although conceding to the fact that the attachment was made and effected after the main application was issued and served, argue that this fact does not invalidate the order or the attachment.

[55] Advocate Pistor SC argued on their behalf that the difference between attachment *ad fundandum* on the one hand and attachment *ad confirmandum* on the other hand has to be taken in account. Whilst in the case of attachment *ad fundandum* the attachment is necessary to found jurisdiction, the position in respect of an attachment *ad confirmandum* is materially different since in the latter case a Court does have jurisdiction but the attachment needs to be made in order to provide some asset to satisfy a possible judgment in order to give effect thereto.

[56] He submitted that in respect of applications it is not required that a notice of motion must be issued by the Registrar and the application is therefore instituted when the motion is served on the respondent irrespective of whether the Registrar has signed the notice of motion or not. Consequently, jurisdiction must exist at the time when respondent receives the notice of motion. He submitted that the main reason why jurisdiction must exist at the stage when an action/application is instituted (i.e. served on the defendant/respondent) is to enable the respondent to properly plead or to file an answering affidavit and then to also be in a position to evaluate whether at that stage the plaintiff / applicant has made sufficient averments on the strength of which it can be said that the Court has jurisdiction.

[57] He urged this Court to take into consideration that *In casu* the attachment was made after the notice of motion was served on the applicant. He submitted that although he could not find a reported case with a similar factual setting or a reported case where an attachment to confirm was made after service of the summons or of a notice of motion and where the

validity of such attachment was considered by a Court, the matter should be considered on general principles or, alternatively on the basis of the inherent jurisdiction of a Superior Court. According to him it is important to note the fact that neither of the Old Act, the New Act or the Rules provide whether attachment should be made before or after the main Application is instituted.

- [58] In expanding on this submission he submitted that the proceedings in the main application have not developed beyond the stage when the notice of motion was served and no answering affidavit has as yet been filed. On the contrary the applicant was granted leave to file her answering affidavit in the main application only at a later stage. He submitted that in such circumstances it does not really matter whether the attachment was made one day before or one day after or even one month after the motion was served. The result is the same: “The attachment was completed before the respondent was called upon to file the answering affidavit”. In such affidavit a respondent would be entitled to dispute the jurisdiction of the Court.
- [59] This argument continued as follows that applicant can therefore not claim to have been prejudiced by the fact that the attachment was made after the application was served. In such circumstances the setting aside of the attachment purely because it was done after, instead of before, the service of the notice of motion in the main application, would amount to an abuse of the process of the Court and this Court has wide powers to avoid an abuse of its own process. This Court also has the power to develop or amend the common law in so far as it might be in the interests of justice. This is also provided for in the Constitution.
- [60] His reasoning for the above proposition in the preceding paragraph is that the facts of this case require that the Court exercise such wide and inherent powers in favour of an order refusing the setting aside of the attachment. In this regard he referred this Court to the following further facts:-
- “(a) The approach of our courts to the principles of attachment ad confirmandum must be viewed against the fact that over the years our courts have to a large extent eroded the principle of effectiveness which has “...largely been actuated by the desire of our Courts to assist incolae to litigate at home.” (his underlining).*
- (b) The attachment in casu was merely to confirm jurisdiction in circumstances where the Court already had jurisdiction. It was therefore not a matter where the attachment was for the purpose of founding jurisdiction.
- (c) Mrs. Van der Walt cannot be prejudiced by the fact that the attachment was made after service of the application instead of before since by the time she will have to file an answering affidavit she would be in possession of all facts relating to jurisdiction in order for her to properly file such affidavit.

- (d) Should the attachment be set aside, the Trustees will be forced to withdraw the main application, to again apply for attachment and then to re-instate the Main Application which then will have the same result but with a huge costs implication.”
- [61] Lastly he pleaded with this Court in the alternative that should this Court be of the view that the attachment should have been made before the main application was served, then and in such event he submitted that the interests of justice will best be served if the Court makes an order that the attachment remain of force and effect on condition that the applicants in the main application shall within 14 court days from the date of the order of this Honourable Court in the Present Application, withdraw the main application and re-institute that application by service of the application on the local attorneys of the applicant and by re-issuing it out of the office of the registrar and that in the event of the said applicants failing to comply with such order within the said 14 court days, the present attachment will fall away as if it had not been made.
- [62] This is another leg in which the applicant’s submissions have merit as well. The proposition by the applicant that the attachment to confirm jurisdiction should be applied to first is supported by the case of Ewing Mc Donald which was approved by the Supreme Court of Appeal in 2006 in the case of Naylor v Jansen; Jansen v Naylor 2006 (3) SA 546 (SCA) wherein Scott JA held as follows:-
- “It is also not in issue that, in the absence of a submission to the jurisdiction of the Court, an arrest or attachment was necessary to confirm the Court a quo’s jurisdiction to entertain the defamation action against Naylor. Indeed, it is well established that, even if a plaintiff is an incola and there exists a recognised ground of jurisdiction, a court will not exercise jurisdiction over a peregrine defendant in an action sounding in money unless the defendant has first been arrested or his or her property attached to confirm the court’s jurisdiction, or the defendant has submitted to the jurisdiction of the court. (See eg Ewing McDonald & Co Ltd v M & M Products Co [1990] ZASCA 115; 1991 (1) SA 252 (A) at 258D – G).” [My emphasis]*
- [63] The issue of submitting or consenting to jurisdiction is irrelevant in our case as already indicated above because it was not requested and the facts of this case does not deal with it in any manner.
- [64] It is noteworthy to mention that the respondents did not refer to any authority to support their contention that it is not necessary that the application to confirm must be before the application commenced. Whereas on the other hand, the applicants relied heavily on what the authors of the book: Erasmus: Superior Court Practice; 2nd edition page A2 - 111 said commenting on the Rules where they remarked:-

“An application for attachment must be brought before summons is issued. It cannot be brought after summons has been issued and appearance

entered, nor, a fortiori, after the close of pleadings. If a plaintiff discovers after proceedings have been instituted that the defendant is a peregrinus, he should withdraw his summons and commence de novo by first applying for attachment and thereafter

issuing his summons.” In support for this the learned authors referred to inter alia Cloete v Van Tonder (1891) 9 CLJ 58 (O), Willis v Seward (1891) 12 NLR 85 and Fechter v Transvaal Mines Labour Co

(1907) 24 SC 237.

[65] This proposition also find solace from the Constitutional Court judgment where it was confirmed that the time to determine a Court’s jurisdiction is at the time the action or application is instituted or commenced. See: Thermo Radiant Case already quoted above.

[66] On any interpretation, it is clear that the Court did not have jurisdiction when the main application was instituted in September 2015. Premised on the aforementioned authorities, such a lack of jurisdiction cannot be remedied by an order to confirm jurisdiction

after the institution of the application. For this reason alone, the attachment order should be set aside.

Outside jurisdiction of the High Court

[67] The applicants Counsel on this last leg applicant relied upon submitted that it is not clear from the papers in the main application where the relevant purchase agreement was concluded. Having regard to the agreement itself, it appears that the purchasers (the respondents) signed the agreement in Rustenburg. However, one purchaser signed the agreement on 31 January 2011, whilst the others signed on 31 May

2012. The seller (the applicant) signed the agreement in Perth, Australia on 29 May 2012. Although this is an issue which may only be finally decided during the hearing of the main application, it is possible that all the purchasers signed the agreement in 2011. If this is the case, the agreement was concluded in Australia with the result that the Court will not even have jurisdiction over the cause of action.

[68] He argued further that it appears from the applicants’ papers that the property attached in pursuance of the attachment order does not fall within the jurisdictional area of this Court. He made reference there to Ewing McDonald quoted above where the following was held in this regard:

“The central issue, which is a controversial one, is thus whether one Division of the Supreme Court of South Africa has jurisdiction to order the attachment ad fundandam or ad confirmandam jurisdictionem of property which is situated outside its area of jurisdiction but within that of another Division.”

“The appellant's main submission may be paraphrased as follows: ... The doctrine of effectiveness lies at the root of jurisdiction... A Court can now make an order which can be executed on assets found outside the boundaries of its jurisdiction, thereby rendering its judgment fully effective. Because effectiveness is the basis of a Court's jurisdiction and because an attachment, after judgment, would render its judgment effective, an attachment before judgment (so it was contended) would equip the Court with the required jurisdiction to try the matter.

I have three major difficulties with this approach. In the first place there is, I believe, a flaw in its logic; in the second place, it emphasises effectiveness at the expense of territoriality; and in the third place it attributes to s 26 of the SC Act a function which, according to the authorities to which I shall presently refer, it does not have. I deal with each of these points in turn.

Firstly. Effectiveness is an essential feature of jurisdiction. A judgment would be effective if an asset outside the jurisdiction but within the country were attached in execution. All of that is so. But the reverse is not equally valid, namely, that since such an asset would be capable, after the suit, of attachment for the sake of levying execution, it is likewise capable, before the suit, of attachment for the sake of conferring jurisdiction. That is to confuse the sequel of a competent judgment (attachment to levy execution) with a prerequisite for its competence (attachment to found jurisdiction) - in short, to transpose cause and effect.

Secondly, while effectiveness may be the rationale for jurisdiction, it is not necessarily the criterion for its existence.”

[69] This is also one of the legs wherein the submission by the applicant did not have merit.

Firstly, the applicant's reliance on the Ewing's case is misplaced on this leg because as correctly submitted by the respondents' Counsel the Ewing matter was decided before the New Act. Secondly, the same authors of the book of Erasmus referred and relied to by the applicant above remarked as follows on the same page A2 – 111 but under (iii) as to what the applicant must show when applying for attachment.

“(iii) The property in which the defendant has a beneficial interest is within that area (or alternatively, if the attachment to confirm jurisdiction is sought, that the property concerned is outside the area of jurisdiction of the Court).”

Thirdly, the analysis and conclusion I reached above in as far as whether the attachment Order was erroneously granted applies mutatis mutandi here.

E. FURTHER GROUNDS FOR RESCISSION

[70] There appears to be two issues raised by applicant in this regard.

- (a) Firstly, it is averred that the bringing of the application for attachment ex parte, was mala fide because the Trustees were by then aware of the fact that Mrs. Van der Walt was represented by Mr. Nienaber and launched the application without any communication to Mr. Nienaber's office.

(b) Secondly, it is alleged on behalf of Mrs. Van Der Walt that in the attachment application the Applicants sought an interim order whilst a final order without any rule nisi was in fact granted. By implication, on my understanding of this point, it appears that Mrs. Van Der Walt maintains that the grant of a final order whilst an interim order was sought is wrong.

[71] I choose not to deal in detail with the submission of the applicant in this regards for the mere reason that these submission were ill-conceived from the onset.

[72] The fact that the respondents, in their notice of motion, initially provided for a Rule Nisi whilst they were in law entitled to seek a final order does not prevent them from seeking a final order ex parte and does not prevent the Court from granting such order ex parte. Djaje AJ was therefore, fully entitled to grant an order in line with the practice of our Courts over a long period of time as referred to above.

[73] It must be emphasized that the procedure relating to attachment ad confirmandum was developed in favour of an incola who is entitled as of a right to proceed ex parte. To proceed with a notice will undoubtedly lead to absurdity as the whole purpose of the application will be eroded. See: Nayler's case referred to above in this judgment.

F.

CONCLUSION

[74] The ex parte application was launched after the institution of the main application whereas, as aforementioned, an application to confirm jurisdiction ought to be launched before instituting an action / application. As a result, the Court did not have the necessary jurisdiction to deal with the main application when same was launched. What aggravates this matter is that the respondent when they applied for the attachment order they did not tell the Court that heard the matter that the main application was already filed in this

application, and that they are filing this application ex post facto as they realised that they omitted to do so before the main application was enrolled to confirm jurisdiction. The respondents filed this attachment application when realising that the main application will probably not succeed because there will not be anything that the judgment will be satisfied from and furthermore not be granted if the Court realises this or will simply throw them out of Court when the applicant who is the respondent there raised the issue of jurisdiction. It does not need a rocket scientist to realise that they foresaw this stumbling block or predicament.

[75] In my view, had the Court that granted the attachment Order been made aware of this fact there is a strong probability that the attachment will not have been ordered. At any rate, our law requires the respondents that if they realised ex post facto the proceeding of the main application / action had commenced, they should withdraw the main application and start afresh. This the respondent did not do. The attachment can therefore not stand. I choose not to pronounce any Order in as far as the main action is concerned because it is not before me. It suffices to limit my reference thereto as I did to the parameters that I confined myself

in the analysis of the issues that were raised in this application.

H. COSTS

[76] Although the applicants did not succeed in the other grounds that she raised she is nevertheless substantially successful by virtue of the conclusion that I reached. Success generally carries costs. I do not find any reasons why the general principle should not be followed.

[77] The conclusion that I arrive at is that despite the fact that applicant did not succeed with other grounds relied upon, the ones in which she succeeded are key, and therefore she made out a proper case for the relief sought in her notice of application in the rescission application. An order in the following terms will be appropriate:-

77.1 The order made on 10 December 2015 under case number M372/15 is set aside;

76.2 The attachment made in pursuance of the order of 10 December 2015 is set aside;

76.3. The respondents are ordered to pay the costs of this application.

A M KGOELE

JUDGE OF THE HIGH COURT

ATTORNEYS:

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