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THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 2637/02

In the matter between:

SOLOMON MAPHANGA	**Applicant**
And	
WBHO (SWAZILAND)	**Respondent**
In re:	
SOLOMON MAPHANGA	**Plaintiff**
And	
WBHO (SWAZILAND) LIMITED	**Defendant**

CORAM : **MASUKU J.**

For Applicant : **Mr J.W. Maseko**
For Respondent : **Adv. J.M. v.d. Walt (Instructed by Robinson Bertram)**

RULING ON POINTS IN LIMINE
13/09/02

This is an application filed under a Certificate of Urgency and in which the Applicant applies for attachment *ad confirmandum jurisdictionem* of certain movable assets of the Respondent company. The Notice of Motion reads as follows:-

1. That the above Honourable Court dispenses with the form, time limits and the manner of service and hearing this matter as one of urgency.

2. That a *rule nisi* be and is herby issued returnable on a date to be fixed by the above Honourable Court calling upon the Respondent to show cause why prayer 2.1, 2.2, 2.3 herein below should not be made final

2.1. That the Sheriff or his lawful deputy be and is hereby authorised and directed to attaché ad *confirmandum jurisditionem* the motor vehicles listed herein;

HJW 157 GP ... BELL TANKER
MJF 719 GP ... GRADER / DRESSER

2.2. All such movable property belonging to the Respondent as the Sheriff or his lawful deputy may discover in Swaziland.

2.3. That the Sheriff or his lawful deputy be and is hereby authorised to hold the said property attached by him pursuant to paragraph 2 above pending the outcome of proceedings instituted by the Applicant against the Respondent, in which proceedings Applicant claims;

a) Payment of the sum of E510,000.00 (Five hundred and ten thousand Emalangeni) in respect of damages sustained by Applicant with regard to his house.
b) Interest at the rate of 9% per annum a *tempore morea.*
c) Costs of suit.
d) Further and/or alternative relief,

3. That the payers 2.1, 2.2, 2,3 operate within interim immediate effect.

4. That the costs of this application be costs in the cause of action referred to in paragraph 3 above.

5. Further and/or alternative relief.

It is common cause that the Applicant, under the same case number, instituted action proceedings against the Respondent arising from earthmoving works carried out by the

Respondent connected to the construction of the Mbabane – Ngwenya road. The Applicant alleges that as a result of some blasting activities his house, at Nkoyoyo, which is developed was damaged and is not habitable anymore. Furthermore, his borehole from which he drew water was affected by digging of gravel to the extent that the supply of water to the house has been affected. The quantum of damages alleged is E510,000.00, together with interest thereon and costs.

The Applicant has applied for attachment *ad confirmandum jurisdictionem* of the above named items on the grounds that the Respondent is a *pereginus* of the above Honourable Court as it is a subsidiary of WBHO (Pty) Ltd, based in the Republic of South Africa. The Applicant further contends that the Respondent has no fixed immovable and unencumbered assets within the Court's jurisdiction. He further avers that the Respondent has almost completed the construction of the road in question and has begun repatriating presumably its assets back to the Republic of South Africa.

The Respondent has raised two crisp points of law, namely, that the Applicant has failed to make out a case for attachment as the Defendant is not a *peregrinus* of the above Honourable Court. Secondly, it is alleged that the Applicant has failed to comply with the requirements of Rule 6 (25) (b) of the High Court Rules as amended relating to urgency.

The Respondent, within the very stringent time limits managed to file an Answering Affidavit and in which the points *in limine* above were raised. Further, the Respondent opposed the grant of the prayers sought on the merits. This Ruling is confined solely to the points *in limine*.

I propose to deal with the points *in limine ad seriatim*.

A: Attachment *ad fundandam* or *ad confirmandam jurisdictionem* – the law applicable

Herbstein and Van Winsen, in their work entitled, "The Practice of the Supreme Court of South Africa", 4th Edition, 1997 at page 93 state the following: -

*"Where an **incola** wishes to sue a **peregrinus** to enforce a claim sounding in money*

or relating to property, and none of the usual grounds upon which the court might have jurisdiction is present, attachment is a condition precedent to the action, for it is upon the attachment that the Court's jurisdiction is founded."

The grounds upon which the Court can exercise the jurisdiction were stated by De Villiers C.J. in **EINWALD VS GERMAN WEST AFRICA CO. (1887) 5 SC 86** at **91** as the following:-

*"The grounds are three-fold: **viz** by virtue of the defendant's domicile being here, by virtue of the contract 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. If the defendant is domiciled here, the process of attachment is wholly unnecessary, but, in the absence of such domicile, the invariable practice of this Court has been to attach the person or property of the defendant for the purpose of founding jurisdiction, even where that latter two requisites are present."*

According to Erasmus, "Superior Court Practice," Juta, 1997, at page "A1 – 27, the jurisdictional connecting factors recognised at common law, which is also the common law of Swaziland in this respect are the following:-

(a) residence
(b) domicile (*ratio domicillii)*
(c) the situation of the subject – matter of the action within the jurisdiction (*ratio rei sitae)*
(d) cause of action (*ratio rei gestae)*
(e) commission of a delict within the jurisdiction (*ratio delicti*)

The statutory provisions relating to jurisdiction in our Courts is governed by the provisions of Section 2 (1) of the High Court Act, No.20 of 1954, which reads as follows: -

"The High Court shall be Superior Court of record and in addition to any other jurisdiction conferred upon it by the Constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law possess and exercise all the jurisdiction power and authority vested in the Supreme Court

of South Africa."

The relevant provision in the South African Statutes dealing with jurisdiction is Section 19 (1) (a) and reads as follows: -

> *"A provincial or local division shall have 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 shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law..."*

From the foregoing, it is clear that both at common law and statute law, this Court has jurisdiction over persons who reside or are domiciled within its jurisdiction. The question to determine next is whether this Court does have jurisdiction over the Respondent *in casu* and if it does, whether proceedings to attach the Respondents property to found or confirm jurisdiction were necessary and appropriate.

The Respondent has been cited in the papers as WBHO (SWAZILAND) LIMITED, suggestive of the fact that the Respondent is a locally registered company. If there is any doubt about the correctness of the above, that confusion is cleared by the Applicant in paragraph 2 of the Founding Affidavit where the Respondent is described in the following language: -

> *"The Respondent is WBHO (Swaziland) Limited a company registered in terms of the company laws of the Kingdom of Swaziland and having its principal place of business at Motshane along the Mbabane/Ngwenya public road within the district of Hhohho."*

At paragraph 3, the Applicant proceeds to state the following: -

> *"The above honourable court has jurisdiction to hear and determine the above matter that the whole cause of action wholly arose within the jurisdiction of the above Honourable Court."*

From the bases upon which this Court has jurisdiction and which are outlined above, it is clear therefor that the Court has jurisdiction over the Respondent in at least the two following respects: -

a) Respondent is 'resident' within the jurisdiction of this Court;
b) The cause of action arose within the Court's jurisdiction.

Was it therefor necessary to move this application in view of the notorious fact that the Respondent is an *incola* of this Court?

According to Erasmus (*supra*), at page A1 – 30, an Applicant for attachment *ad fundandam jurisdictionem et ad confirmandam jurisdictionem* must show that: -

(i) it has a *prima facie* cause of action against the defendant i.e. the applicant must tender evidence which, if accepted, will establish a cause of action;

(ii) the defendant is a *peregrinus*; and

(iii) the defendant is within the area of jurisdiction of the court or that the property in which the defendant has a beneficial interest is within that area. The onus is upon the applicant to show that the property belongs to the debtor.

From the three requirements, it is immediately clear on the facts and from the Applicant's own allegations that the Respondent is not a *peregrinus* of this Court since it is a locally registered company with its place of business situate within this Court's jurisdiction. This in my view provides sufficient ground for refusing to grant the application. No authority that I have consulted permits of a distinction between holding and subsidiary companies, such as to hold that a subsidiary is not a local company. Mr Maseko argued that the Respondent's residence within this Court's jurisdiction is meaningless as it does not have immovable and unencumbered property within the Court's jurisdiction such that, so ran the argument, any judgement granted would be rendered hollow, nugatory or *brutum fulmen*. Although the latter may be true, I venture no opinion on this, the fact of the matter and on first principles, attachment is applicable and appropriate only in cases where the

Respondent is a *peregrinus*. In *casu*, the Respondent is not. The Applicant has clearly employed the wrong procedure, if at all it is true as alleged by the Applicant (and which is denied by the Respondent) that the latter has almost completed its business and is repatriating its assets out of the Court's jurisdiction. No authority is cited to show that this attachment can be authorised where the Defendant is an *incola* and in order to lend effectiveness to the Court's judgement.

Furthermore, one can hardly say, on the facts before Court that the Applicant has discharged the *onus* to prove that the goods identified above and which the Court is requested to order to be attached belong to the Respondent. Some information must be placed before Court to prove that assertion. Mere use of the property by the Respondent in my view falls far short of discharging the onus. Prayer 2.2. is clearly nebulous and one wonders if it would be regarded sufficient.

I say this in view of the principle laid down by Herbstein & Van Winsen (*supra*) at page 108, namely, that if it is sought to attach property, details of that property, its value and situation must be disclosed. This is clearly not the case *in casu*.

Even if this were a proper case, there clearly is insufficient admissible evidence before Court to the effect that the Respondent is about to complete the construction of the road and that it is already repatriating to the Republic of South Africa. The source of this information is not disclosed for the Court to lend any credence to it whatsoever.

In my view, the Applicant has instituted wrong proceedings in a quest to secure his interests. A *Mareva* injunction (as it is called in English law) would probably have been the more appropriate proceedings. This point of law must be upheld and I so order.

(B) Urgency.

Rule 6 (25) (b) of the Rules of Court, which has been accepted as mandatory, in view of the nomenclature employed, provides the following: -

> *"In every affidavit or petition filed in support of any application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which*

he avers render the matter urgent and the reasons why he claims he could not be afforded substantial redress at a hearing in due course." (my emphasis).

Commenting on the requirements of the above sub-rule on an applicant, I stated the following in **MEGALITH HOLDINGS v RMS TIBIYO (PTY) LTD & ANOTHER CASE NO.199/00** at page 5:-

"The provisions of Rule 6 (25) (b) above exact two obligations on any Applicant in an urgent matter. Firstly, that the Applicant shall in affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Secondly, the Applicant is enjoined, in the same affidavit or petition to state the reasons why he claims he could not be afforded substantial redress at a hearing in due course. These must appear ***ex facie*** *the papers and may not be gleaned from surrounding circumstances brought to the Court's attention from the bar in an embellishing address by the Applicant's counsel."*

In an attempt to address the requirements of the above sub-rule as amplified above, the Applicant stated the following at paragraphs 14.1 to 14.3: -

"14.1 I submit that the matter is urgent in that the Respondent company is in the process or (sic) repatriating to the Republic of South Africa with a majority of its equipment already transported back to the said Republic."

"14.2 I sincerely believe that the Respondent has no fixed unmovable and unencumbered assets within the jurisdiction of the said Court hence I fear and anticipate irreparable loss as my claim would not have been secured. The Respondent is merely a division of mother company based in the Republic of South Africa."

"14.3 I submit that I have no other remedy other than the one sought in these proceedings."

Do these allegations as they presently stand meet the rigours set out above? I think not. The circumstances averred which render the matter urgent appear to be based on

inadmissible hearsay matter. The Court is not told as to how the Applicant has come to the conclusion that the Respondent is winding up its business and relocating to South Africa. He does not say where, when and under what circumstances this conclusion was arrived at. In particular, there are no reasons stated why the Applicant claims that he cannot be afforded substantial redress at a hearing in due course. All that the Applicant contented himself with doing was to merely allege that there is no other remedy. The mere repetition of those words, in the absence of reasons from which the conclusion can reasonably be drawn constitutes no magic wand. It only amounts to paying lip-service to this sub-Rule without advancing the matter an inch.

It is my considered view that the point on urgency is also well taken. Prayer 1 would for these reasons have to be refused. Costs will follow the event. An application was made on the Respondent's behalf to include the costs of Counsel as certified in terms of Rule 68. It is my view that the instructing of Counsel was particularly in view of the application for attachment necessary. I order that the provisions of Rule 68 (2) shall apply.

T.S. MASUKU
JUDGE