IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1206/2012

In the Exparte Application

Between

SMADCO INVESTMENTS (PTY) LTD **APPLICANT**

And

INYONI BOERDERY VERVOER **RESPONDENT**

In Re:-

IZUSA CARRIES CC T/A

INYONI BOERDERY VERVOER **APPLICANT**

And

SMADCO INVESTMENTS PTY LTD **RESPONDENT**

Neutral citation: ***Inyoni Boerbery Vervoer vs SMADCO Investment (Pty) Ltd v (2606/2012) 25th September*** **2012 [SZHC] 243**

Coram: **OTA J.**

Heard **21st September 2012**

Delivered: **25th September 2012**

Summary: **Attachment ad confirmandam jursidictionem: whether competent to set aside order of attachment after execution has taken place: principles thereof.**

OTA J.

[1] This is an application to set aside an attachment *ad confirmandam jurisdictionem.* The Applicant is a peregrinus of the Kingdom of Swaziland. The Respondent is an incola of this court. The Respondent obtained an exparte order of attachment against some properties of the Applicant and also leave to institute action against the Applicant by edictal citation. The Respondent's claim against the Applicant is premised on an accident involving the Applicant's truck and Respondent's truck in Swaziland, in respect of which Respondent alleges that it sustained damages in the sum of E834,800=00 due to the negligence of the Applicant's truck driver. It is thus clearly a claim sounding in money.

[2] It is common cause, that after the attachment was executed the Applicant unilaterally conceded to the jurisdiction of the court and also provided a letter of guarantee dated 17th September 2012, from Ned Bank South Africa, in which the bank specifically guarantees in paragraphs 4 and 4.1 thereof, to be responsible for any judgment debt entered for the Respondent against the Applicant in respect of the motor vehicle accident.

[3] Counsel for the Applicant **Mr Henwood** therefore contends, that in these circumstances, the attachment should be set aside. He urged the case of **Jameison v Sabingo (2000) 3 All SA 392** in support.

[4] On the other hand, the Respondent takes the view that after a writ of attachment has been executed, it can no longer be set aside. **Mr Shabangu** who appeared for the Respondent contended, that this is because quite apart from confirmation of jurisdiction, the attachment serves another purpose, which is that it secures enforcement of the judgment if granted to the incola. **Mr Shabangu** however conceded, that exceptional circumstances may exist which will require that the attachment be set aside,but that such exceptional circumstances do not exist in casu, because the Applicant has made absolutely no allegation that he has a defence to Respondent's claim. Further, that mere submission to jurisdiction after attachment does not entitle the Respondent to an order setting aside the attachment. That the security offered by way of the bank guarantee does not found such exceptional circumstance, because it is a guarantee from another peregrinus, a foreign bank, in which the Respondent did not participate, therefore it serves no useful purpose.

[5] **Mr Shabangu** finally contended that the case of **Jameison (supra)** urged by **Mr Henwood**, has no application on the facts of this case because it dealt with a bilateral submission to the jurisdiction of the court, which is not the position herein.

[6] Now, the only question for determination in this case is whether an order of attachment to found or confirm jurisdiction can be set aside after it has been executed?

[7] A starting point to the enquiry at hand to my mind, is an understanding of why it is necessary to attach the property of a peregrinus.

[8] In the case of **Jameison (supra) Farlam JA** said the following about this necessity:-

"(21) -------It is clear from the authorities, (see e.g ***Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A) at 310 (H),*** *that the purpose of an attachment to found or confirm jurisdiction is to enable the court to pronounce a judgment "which will not be void of result"*

(22) The normal rule, to which the rules relating to attachments to found and confirm jurisdiction and submissions to jurisdiction are exception, are ***actor sequitur forum rei****. As it was put in the* ***Thermo Radian case (supra) at 305 C-D*** *"an incola was compelled to institute action against a peregrinus in the latter's country of domicile". This rule is based on the principle of effectiveness:-*

*"The court can give an effective judgment ----- because it considered that usually a person's possessions are where his home is, and that execution can be levied against those possessions" (****Thermo Radiant case at 309 G-H)***

(23) *Where action is sought to be instituted in a court other than the* ***forum rei*** *the court in order to be able to give "a judgment which will not be void of result" has to have some of the defendant's property preserved in its area of jurisdiction until after judgment so that execution can be levied thereon* ***(Thermo Radiant case (supra) at 306 F).***

(24) *Those considerations do not apply where the Defendant has submitted to the court's jurisdiction. This is because a judgment given by a court against a peregrinus who has submitted to its jurisdiction will be internationally enforceable and will, eg be recognized by the court of the judgment debtor's domicile. It is sometimes said (see e.g the* ***Thermo Radiant case at 307A****) that the principle of voluntary submission to jurisdiction is an exception to the principle of effectiveness but that is only true, as was pointed out by* ***John Peter*** *in his article* ***"consent confusion but no effect" (1993) 110 SALJ 15 to 20),*** *insofar as it is an Exception to the rule that a court must be able to give effect to its own judgment.*

(25) *Indeed a judgment founded on a voluntary submission to jurisdiction by the Defendant is in many ways better than a judgment founded on an attachment where the defendant has not appeared and contested the suit. Such a judgment binds only the property attached and has no extra territorial force and obligation (see the passage from story* ***conflict of Laws, 8 ed at paragraph 549****, approved by* ***De Villiers CJ in Acutt Blaine Co v Colonial Marine Assurance Co (1882) 1SC 402 at 406,*** *which I quoted in* ***Blue Continent Products (Pty) Ltd v Foroya Bank PF 1993 (4) SA 563 (c) at 570 C-E).*** *On the other hand a judgment based on a voluntary submission to jurisdiction is not only internationally enforceable but binds the whole property of the judgment debtor, it is clearly not "a judgment void of result"*

[9] It follows from the foregoing, that though the primary purpose of an attachment is to found or confirm jurisdiction, it's further object is to furnish an asset upon which to excute the judgment debt, to prevent it from becoming a phyrric victory, or nothing or empty sheaves of papers or a *brutum fulmen* see **Exparte Heald and another 1952 (3) SA 740 (SR) at 74.**

[10] It is further the position of the law, that where a peregrinus submits to the jurisdiction of the court before attachment, then the necessity for the attachment will be rendered nugatory. This is because submission to jurisdiction has a better effect in that it makes the judgment of the court internationally enforceable against the peregrinus and binds all his possessions, but an attachment of property alone without consent to jurisdiction, makes the judgment binding only on the property attached.

[11] However it is the general position of the law that submission to jurisdiction after attachment has taken place, is not a ground for setting aside of the attachment. This position of the law was demonstrated by the court in the case of **Tsung v Industrial Development Corporation of SA Ltd 2006 (4) SA 177 (SCA),** paragraph 8, as follows:-

"(8) That brings me then to the issue in this case, namely, whether an attachment can be undone by a late consent. The case law in this regard has a long lineage. The first case in this regard was ***Ellerton Syndicate v Hutchings (1893) 3 CTR 124, De Villers CJ*** *decided the point laconically, holding that the attachment served a double object,*

namely, to facilitate proceedings and to obtain security, and "If, the law gave them (the incolae) that advantage, they were entitled to take it. Then there was ***Bedeaux v McChesnesy 1939 WLD 128 at 132****, where* ***Solomon J*** *came to the same conclusion for the same reason. The issue was again raised before* ***Berman AJ in Kasimov and Another v Kurland 1987 (4) SA 76 (c),*** *who decided to follow* ***Bedeaux****. He added that* ***Bedeaux*** *had to be right (at 81A)*

"For otherwise every peregrinus whose property has been attached to confirm jurisdiction could voluntarily submit to the court's jurisdiction, thereby ensuring the release of that property, and thus frustrate the incola from executing against the already attached property or obtaining a judgment in his favour. This would effectively do away with one of the objects of the attachment of the property of a peregrinus"

[12] The judgment in **Blue Continents Products (Pty) Ltd v Foroya Bank PF 1993 (4) SA 563 (c)** was to the same effect. **Farlam AJ** added another reason for the conclusion (at 574 F-G)

“If a defendant only submits to the court’s jurisdiction once his goods have been attached, there is the danger that a judgment thereafter given against him may not be recognized internationally because he may be able to contend in some other forum that his submission was not voluntary because it only took place after the arrest ----*“*

[13] This judgment was followed in **Associated Marine Engineers (Pty) Ltd v Foroya Bank PF 1944 (4) SA 676 (c) at 690 B – E.**

[14] It is thus the overwhelming judicial accord, that once an attachment to found or confirm jurisdiction has been executed, it cannot be undone by mere reason of the fact that the peregrinus subsequently consents or submits to the jurisdiction of the court.

[15] A departure from the foregoing principles will be permitted as shown by **Tsung (supra)** at paragraph 9, if a formal application is urged demonstrating exceptional circumstances warranting such an order. In the words of the court:-

(9) *In* ***Better court v Korm and Another (National Airways Corporation (Pty) Ltd Intervening) 1994 (2) SA 513 LT, Hart Zenberg J,*** *also held that a late consent cannot undo an attachment, but added that the peregrinus who belatedly consents is not necessarily without redress. He said* ***(at 517 C-E).***

"I consider myself not to be entitled to set aside the attachment which was validly made in this case. It is any event my view that the correct way to relieve the position of a defendant, who consents to jurisdiction after an attachment and who is inequitably extorted by the attachment, even if he has a good defence, is by an application, as was done in the case of ***Banks v Henshaw 1962 (3) SA 464 (D)****. In such an application a court ought to be at large to look at all the circumstances of the case, such as the amount of the claim, the likelihood of the Plaintiff succeeding, the financial position of the Defendant, the hardship to the Defendant if the attachment remains and similar considerations. The court can then decide if the attachment is to remain unaltered or if it is to be reduced, set aside, or substituted with some other form of attachment or security"*

[16] In casu, the Applicant says it has exceptional circumstances warranting the undoing of the attachment. These exceptional circumstances were demonstrated as follows:-

1. Non service of the summons:- The Applicant contends that since the attachment took place on the 28th of August 2012. Respondent has become contented after the attachment, thus resting on his oars or has fallen into a deep slumber, while the intended litigation is left to languish in a near forgotten land. It however became obvious during argument that the summons has now been duly served, though the date of service was not communicated. This circumstance is therefore defeated.

2. Consent to jurisdiction after attachment:- I have already amply demonstrated in this judgment, that this factor without more is not a *sine qua non* to the setting aside of the attachment. Having said this, I say no more on this issue.

3. Security:- I have also already indicated in this judgment that the Applicant has offered security by way of a bank guarantee from another Peregrinus, Nedbank South Africa.

[17] There is no doubt that when a Defendant or his property is arrested, he can furnish security for his release or the release of his property. The recognized security however, is one furnished to the satisfaction of the sheriff for the amount of the Applicant's claims and the costs of the application. It is clear therefore that the security is given to the satisfaction of the sheriff of the court which attached the property or arrested the Defendant. The court in fixing the security will arrive at a fair and reasonable amount, having regard to the nature of the claim or counterclaim (if any) and the circumstances in which those claims arise. See **Herbstein and Van Winsen Civil Practice of the Supreme Court of South Africa (4ed) page 108 to 109, Thomson Watson Co v Poverty Bay Farmer Meat Supply Co 1924 CPD 93, Bedeaux v Mcchesney (supra), Banks v Henshaw 1962 (3) SA 464 D at 467.**

[18] To my mind, the necessity for the security being to the satisfaction of the sheriff which attached the property is not farfetched. It is based on the object which underpines the whole concept of attachment for confirmation of jurisdiction, which is to secure the effectiveness of the judgment or order which the court deems necessary to make.

[19] In casu, security of this object is clearly missing from the guarantee which the Applicant urges and that is what **Mr. Shabangu** is complaining about. This is because the guarantee was determined without any input by the Respondent or the Sheriff of the court that attached the property. There is therefore no evidence to show that the guarantee which was given by a peregrinus is security to the satisfaction of the Sheriff of the court. But more alarming to me, is the fact that the guarantee is given by another peregrinus, a South African Bank. This state of affairs, to my mind, if the attachment is set aside, will put the Respondent squarely back in the loophole which the attachment was meant to close, which is having to pursue enforcement of the judgment outside the jurisdiction. This may very well end up as an exercise in futility, more so, as there is nothing to show that the Applicant has complied with his side of the obligations detailed in the guarantee. The guarantee therefore serves no useful purpose in these

circumstances. I refuse to countenance it. The Applicant is however not foreclosed from taking further steps in this direction.

4. Balance of convenience:- To my mind the question of balance of convenience must be approached more from the tangent of the object of the attachment, which is to secure the effectiveness of the judgment of the court, than from the angle of which business is suffering more harm by the attachment, the Applicant's or Respondent's.

From the foregoing, it is my view that the Respondent will suffer more prejudice if the attachment is set aside. This is because all it will have left will be the Applicant's consent to jurisdiction, which although it makes the judgment enforceable outside the jurisdiction, however does not secure realization of effectiveness of the judgment. As clearly stated by the court in **Bedeaux v Mcchesney (supra) at (81A)**

"for otherwise every peregrinus whose property has been attached to confirm jurisdiction would voluntarily submit to the courts

jurisdiction, thereby ensuring the release of that property, and thus frustrate the incola from executing against the already attached property on obtaining judgment in his favour. This would effectively do away with one of the objects of the attachment of the property of a peregrinus"

[20] It follows from the above, that the balance of convenience falls squarely in the court of the Respondent. This is my view is compounded by the fact that the Applicant has not urged any defence on the court, for the court to guage the substantiality of it's case.

[21] Before I close this case, let me visit obiter one argument made by **Mr Shabangu**, in the interest of the jurisprudence of the Kingdom. **Mr Shabangu** submitted, that the case of **Jameison (supra)** is distinguishable from this case because the attachment was set aside based on the fact of the peregrine's bilateral consent to the jurisdiction of the court. He contended that a distinction must thus be drawn between a bilateral consent and unilateral consent in determining whether the attachment is necessary. I respectfully disagree with Mr Shabangu. This is because in **Jameison**

(supra) the order and writ of attachment were set aside because the submission to the jurisdiction of the court was given before the order of attachment was executed. In casu, the attachment had already taken place before consent to jurisdiction, that is the distinguishing factor.

[22] Furthermore, it is the judicial accord that there is no difference between bilateral submission (one that is contained in a contract between parties) and a unilateral submission (where a defendant, without the plaintiff's consent, submits to the jurisdiction of the court). This is because both types of submissions render the judgment of the court internationally enforeceable. See **Jamison (supra) at para 26, American Flag PLC v Great African T – Shirt Corporation CC In re Exparte Great African T Shirt Corporation CC 2000 (1) SA 356 (w).**

[23] In conclusion, this application fails. It is accordingly dismissed with costs.

For the Applicant: J. Henwood

For the Respondent: Z. Shabangu

DELIVERED IN OPEN COURT IN MBABANE ONTHIS

THE ……………………….. DAY OF …………………..2012

OTA J.

JUDGE OF THE HIGH COURT