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J P S NOMINEES (PTY) LTD v BINSTOCK AND ANOTHER 1993 (1) SA 341 (W) A

Citation	1993 (1) SA 341 (W)
Court	Witwatersrand Local Division
Judge	Lazarus J
Heard	April 22, 1992
Judgment	April 27, 1992

B

Flynote : Sleutelwoorde

Jurisdiction - Submission to - Mere appointment of address within jurisdiction of Court at which service will be accepted insufficient to support allegation of submission to jurisdiction.
C Jurisdiction - In action to establish claim on which sequestration proceedings based - Court hearing application for sequestration having jurisdiction over respondent Israeli citizens by virtue of s 149 of Insolvency Act 24 of 1936, but postponing application sine die to enable applicant to establish claim by way of action - Respondents alleging lack D of jurisdiction in special plea to particulars of claim - Court holding that action not part of sequestration proceedings - Action a different proceeding preparatory to possible sequestration proceedings - Jurisdiction thus to be established on one of recognised grounds.

Headnote : Kopnota

E The plaintiff, as applicant, had sought the sequestration of the estates of the defendants, who were Israeli residents and citizens, although they were alleged to have resided and conducted business within the jurisdiction of the Court prior to the application being brought. Jurisdiction in the proceedings was not, however, in issue because the Court hearing the application had jurisdiction by virtue of s 149 of the Insolvency Act 24 of 1936. Because of a dispute as to whether or not the plaintiff had a liquid claim against the defendants, the matter was postponed *sine die* 'to give the applicant an opportunity of establishing F its claim by way of action'. The action was required to be instituted within seven weeks and the defendants were required to 'create authority for someone in the Witwatersrand to receive service of summons on their behalf'. The defendants nominated the address of their local attorneys as the address at which service would be accepted. Their plea to the plaintiff's particulars of claim, which had been served within the stipulated period, included a special plea that the Court had no jurisdiction in the action. The plaintiff sought to amend its particulars G to include grounds upon which the Court was alleged to have jurisdiction. It claimed, *inter alia*, that *(a)* by accepting service of all pleadings at the address of their local attorneys, the defendants had submitted to the jurisdiction of the Court; and *(b)* the action was ancillary to the sequestration application for which the Court had jurisdiction. The defendants opposed the amendments.

Held, that the action was not part of the sequestration proceedings but was, instead, a different proceeding preparatory to possible sequestration H proceedings.

Held, accordingly, that the Court's jurisdiction had to be established on one of the recognised grounds.

Held, further, as to the plaintiff's argument that, on a proper interpretation of the order postponing the sequestration proceedings, read with the defendants' appointment of an address for service, there had been a submission to jurisdiction, that no order of Court could create a jurisdiction which did not otherwise exist. I

Held, further, that the fact that the defendants had appointed an address for service within the area of the Court's jurisdiction in compliance with an order of Court was wholly insufficient to support an allegation of submission to jurisdiction. The application for amendment was accordingly dismissed.

Case Information

Application to amend particulars of claim. The issues appear from the J reasons for judgment.

LAZARUS J

A Mrs *K I Foulkes-Jones* for the plaintiff.

W J Vermeulen for the defendants.

Cur adv vult.

Postea (April 27). B

Judgment

Lazarus J: This is an action for payment of the sum of R95 000, interest thereon and costs, brought against two defendants. The history of this matter is as follows.

In August 1990 the plaintiff as applicant brought proceedings against the two defendants as respondents for an order placing their estates under C compulsory sequestration. The jurisdiction of the Court was not in issue, the Court having jurisdiction by reason of s 149 of the Insolvency Act 24 of 1936 despite the fact that the respondents were Israeli citizens. However, one of the matters that was in issue was whether or not the applicant had a liquid claim, the debt alleged by the applicant being disputed by the respondents.

On 27 September 1990 Flemming J made the following order: D

'1. The application is postponed *sine die* to give applicant opportunity of establishing its claim by way of action.
2. Costs are reserved.
3. Any party may set the matter down on notice to the other parties:
E 3.1 if action is not instituted within seven weeks from today;
3.2 if the action is in any way terminated;
3.3 if the respondents do not within three weeks create authority for someone on the Witwatersrand to receive service of the summons

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on their behalf,
F in which event the matter may be set down for alteration of this order to the general effect that the matter is referred for a hearing of oral evidence. In the latter event the parties will be at liberty to approach me in Chambers instead of doing so by way of formal application.'

On 15 November 1990 the applicant (as plaintiff) served its particulars of G claim in which it claimed against the respondents (as defendants) payment in the sum of R95 000 plus interests and costs. The defendants then pleaded and their plea included a special plea to this Court's jurisdiction in which it was alleged that the defendants were resident in Israel; that the plaintiff had set out no basis on which the Court had H jurisdiction; and accordingly that the Court had no jurisdiction. In fact, the only allegation which could be considered as having relevance to jurisdiction was the allegation that each of the defendants had chosen to accept service of all process and documents at care of their attorneys.

At the hearing of the action plaintiff gave notice of its intention to amend its particulars of claim by the addition of the following para 17:

I 'The above honourable Court has jurisdiction in this matter on the basis of the following:
17.1 The entire cause of action upon which this matter is based arose within the area of jurisdiction of this honourable Court in that the agreement upon which the action is based was entered into J within the area of jurisdiction of this honourable Court.

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A 17.2 The performance of the contract was to take place within the area of jurisdiction of this honourable Court, and the breach which gave rise to the action arose within the area of jurisdiction of this honourable Court.
17.3 At the time of the institution of the action herein defendants were outside the area of jurisdiction of this honourable Court, B but were either ordinarily resident within the area of jurisdiction of this honourable Court, alternatively were domiciled within the area of jurisdiction of this honourable Court and were accordingly *incolae* of this Court.
17.4 Alternatively, prior to the commencement of this action, C defendants submitted to the jurisdiction of this honourable Court in that they chose a *domicilium citandi et executandi* at c/o the offices of their attorneys of record in Johannesburg within the area of jurisdiction of this honourable Court and did so in writing in a letter dated 16 October 1990, addressed by defendants' attorneys to plaintiff's attorneys in compliance with D an order of this honourable Court handed down by His Lordship Mr Justice Flemming on 27 September 1990, and the cause of action arises within the area of jurisdiction of this honourable Court.
17.5 Alternatively, the present action is ancillary to an application brought by plaintiff out of the above honourable Court against E defendants for, *inter alia*, their sequestration under case No 90/19749. The above honourable Court had jurisdiction in the aforesaid application proceedings in that, under the provisions of s 149 of the Insolvency Act at the time when the application was launched:
F 17.5.1 defendants owned a business within the area of jurisdiction of this honourable Court known as Harry Losky's Garage; and
17.5.2 defendants owned property in the form of cash moneys in the sum of R80 000 deposited with Nedbank Ltd within the area of jurisdiction of this honourable Court; and G
17.5.3 defendants were domiciled within the area of jurisdiction of this honourable Court at the time of the launching of the application proceedings; and
17.5.4 defendants had ordinarily resided in the Republic of South Africa for 12 months immediately preceding the H launching of the application; and
17.5.5 defendants carried on business within the area of jurisdiction of this honourable Court for 12 months preceding the lodging of the application under the name and style of Harry Losky's Garage.'

There was an objection to each of the paragraphs of this amendment, and I I intend dealing with them *seriatim.*

Paragraph 17.1 and 17.2 do not, it is conceded, provide grounds of jurisdiction in an action against *peregrini.*

In regard to para 17.3, there is an allegation in para 9.1 of the summons that on 8 July 1990 first defendant and/or second defendant abandoned their business and left South Africa for the purpose of evading J their debts

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A and with no intention of returning to the Republic. It was argued that this allegation could not stand with the allegation that defendants were ordinarily resident or domiciled within the Court's jurisdiction, and in answer plaintiff's counsel in effect abandoned this ground of jurisdiction.

It is paras 17.4 and 17.5 with its subparagraphs which were strenuously B argued by the plaintiff. In order to assess the efficacy of the argument it is necessary to consider the effect of the order made by Flemming J. The application for sequestration was postponed *sine die* to give the applicant an opportunity of establishing its claim by action. That is how the order reads. If the events referred to in 3.1 and 3.3 of the order did not happen (or, in the case of 3.2, did happen) the application for C sequestration could be set down on notice to the other parties in which event the order made, insofar as it referred to an action, could be altered to one referring the matter for evidence. That is the way I interpret it, and I did not understand either counsel to set up a different interpretation. What the applicant did was to file particulars D of claim within the seven weeks allowed and to serve them on the defendants' attorneys, the defendants having appointed their attorneys' address as their address for service. No summons was served as contemplated by the order, but no point was made of this and the action continued until close of proceedings.

The issue in this connection is whether the effect of the order was to refer the matter to trial on the question of debt. If it was, then, so it E is argued, it would be similar to reference of an issue to evidence and the Court would retain the jurisdiction that it had in the sequestration proceedings. If it was not, and if the action was an entirely separate proceeding and not an ancillary one, it would have to have its own grounds of jurisdiction. The plaintiff contended the former, the defendants contended the latter.

F The first case to which I was referred was *Ex parte Berson; Levin and Kagan v Berson* 1938 WLD 107 at 116 of the judgment. Murray J said:

> 'In *Tomkin (Pty) Ltd v Bauer* 1931 TPD 292 the Court allowed a creditor against whom the balance of probabilities lay to adduce *viva voce* the evidence to establish an act of insolvency. I think a different principle G applies where it is not an act of insolvency but the existence of the creditor's necessary liquidated claim, which is in dispute. The former can only be established in sequestration proceedings. The proper method of establishing the latter is a separate action on the claim preparatory to the invocation of the Insolvency Act.'

This is an indication that where the existence of the liquidated claim has H to be established it is not established as part of the sequestration proceedings but in separate proceedings. This case has been consistently referred to with approval in subsequent cases. The change in the wording of the Insolvency Act of 1936 (see *Provincial Building Society of South Africa v Du Bois* 1966 (3) SA 76 (W)) did not affect this position. The I severance between the sequestration proceedings and the action to prove the claim again appears from *Silver Trade Supplies (Pty) Ltd v Valley* 1961 (4) SA 70 (W). In that case Galgut J said at 71-72:

> 'In *Kleeman v David Naturman (Pty) Ltd* heard in this Court on 20 March but not reported, Claassen J had to deal with a matter which had many features similar to the present. In that case he made an order which reads:
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> "Application for evidence to be heard under Rule 9 is dismissed. The J applicant

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> A is to institute action against the respondent within 14 days to prove his claim and the costs of this application are to be decided in that action. If such action be not instituted in the time mentioned or if the action be not completed the applicant will have to pay the costs of the application."
>
> I was not sure whether the above order initiated a sound practice and I accordingly discussed the matter with my Brother Judges. It seems to me that to dismiss the present application may only involve the petitioner B and the respondent in further costs should the petitioner succeed in the action in the magistrate's court

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which will have to be instituted in order to prove his claim. Should he succeed and thereafter wish to proceed to sequestration it will mean filing papers afresh.

In all the circumstances of the case it seems to me to be wiser to make the following order which I accordingly do: The application for C sequestration is postponed *sine die* without prejudice to the rights of any creditor who wishes to apply for the sequestration of the respondent. If the present applicant does not institute action in the magistrate's court within 21 days and/or if it fails to duly prosecute that action to its conclusion, it is to pay the costs of this application and the application will be deemed to have been dismissed. If it does so institute and prosecute the said action and fails therein then the application is deemed to have been dismissed and it is to pay the costs. If it duly proceeds and D succeeds in the action in the magistrate's court it may then set the present matter down for hearing.'

(See too *Braithwaite v Gilbert (Volkskas Bpk Intervening)* 1984 (4) SA 717 (W).)

E In the result, it is my view that the action is not part of the sequestration proceedings but a different proceeding preparatory to possible sequestration proceedings, and the Court must have jurisdiction to hear it based upon one of the recognised grounds.

The next question is whether the Court did have such jurisdiction. It F was contended by the plaintiff that, on a proper interpretation of the order of Flemming J, read with the defendants' appointment of an address for service, there was a submission to jurisdiction. Let me say immediately that no order of the Court could create a jurisdiction which did not otherwise exist. This being so, what the contention boils down to is that the choice of an address for service is a submission to the jurisdiction. I have been referred by counsel to various cases in this G connection but they do not establish that the selection of a *domicilium citandi et executandi* is sufficient to accord jurisdiction. In fact, the cases seem to establish the opposite. In *Grimshaw v Mica Mines Ltd* 1912 TPD 450 Mason J said at 455-6:

H 'There are many cases in which summons may be properly served so far as mere service is concerned and there may be no jurisdiction in respect either of the cause or even, perhaps, of the person. In cases of divorce for instance a man may reside here, as in *Le Mesurier's* case: he may be served here, and the summons may be duly served, in that sense: but the court may have no jurisdiction, because it has no jurisdiction over that cause.'

I In *ISM Inter Ltd v Maraldo and Another* 1983 (4) SA 112 (T) at 114H-115A Flemming J said:

'Compare, however the *Dairy Board* case at 771H. The decision recognises the necessity of being aware of differences between our law and English law. At 336 it is pointed out that the English law did not have available the procedure of the Roman Dutch law to institute proceedings against a J stranger, viz citing him by way

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A of an edict (in its nature issued by or under authority of the sovereign) coupled with an arrest or attachment. The English law found its solution of the question when a court can assume jurisdiction over the stranger in the approach that this is possible if the stranger can be notified of the action by proper service. I believe that the South African law can accordingly not be determined by relying upon a statement upon the English B law to the effect that the exercise of jurisdiction depends on service.'

Pollak in his book on *Jurisdiction* at 87 says that it is doubtful whether the choice of a *domicilium citandi et executandi* within the area to which the court belongs amounts to a submission to the jurisdiction of the court.

In *Beverley Building Society v De Courcy and Another* 1964 (4) SA 264 (SR) C the defendants, who were *peregrini*, had been sued for an amount due under a suretyship in which they had selected a *domicilium citandi et executandi.* The suretyship covered their obligations under certain four mortgage bonds. On a consideration of the deed of suretyship, together with the mortgage bonds, Maisels J came to the conclusion that what was contemplated was that the mortgagee should have a speedy and immediate D right of recourse against the defendants in the event of default under the bonds. It was accepted by the defendants that their obligations had to be performed in Southern Rhodesia, that the loan was made there, that the properties were situated there, that the purpose of the loan was to develop property there and that the bond was to be repaid there. In all E these circumstances Maisels J concluded that it was more probable that the choice of a *domicilium citandi et executandi* in Salisbury was for the purpose of submitting to jurisdiction rather than simply providing a place for service.

It is not necessary for me to express a view as to whether that case was F correctly decided because I am able to distinguish it on the same basis it was distinguished in the case of *Standard Bank Ltd v Butlin* 1981 (4) SA 158 (D), where Didcott J said at 164F:

'I have much less material than Maisels J did from which to infer a consent to jurisdiction. The picture he saw had more to it than *domicilium citandi et executandi.* It was filled with all sorts of additional details, G which he found highly suggestive. I am asked to place the same construction on the mere choice of a local *domicilium*. The cases are readily distinguishable from each other.'

In the case before me the address for service was chosen at the instance of Flemming J, which removes it even further from the traditional submission to jurisdiction. (See too Dr H Silberberg's *Treatise on the* H *Recognition and Enforcement of Foreign Judgments in South Africa* at 18; the *Standard Bank* case *supra* at 165D; *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 494G-495C.)

In the result I am of the view that the alleged submission to jurisdiction is also not supportable. No other grounds of jurisdiction are set out in the notice of amendment, and in my view it should not be granted.

I In the result the application for amendment is dismissed with costs.

Plaintiff's Attorneys: *Beder-Friedland Inc.* Defendants' Attorneys: *Joffe, Kobrin, Lacob & Lang*.

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