IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

26/8/15

Case Number: 55517/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED. ✓

26/8/15 — DATE

SIGNATURE

In the matter between:

GAVIN CECIL GAINSFORD N.O.	1ST APPLICANT
SHIRISHKUMAR JIVAN KALIANJEE N.O.	2ND APPLICANT
VINCENT MATSEPE N.O.	3RD APPLICANT

And

CLOETE MURRAY N.O.	1ST RESPONDENT
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	2ND RESPONDENT

JUDGMENT

Fabricius J,

1.

The Applicants are the joint Trustees of the insolvent estate of B. D. Tannenbaum. On 6 August 2014 this court granted the Second Respondent ("SARS") a provisional order in terms of ***s. 163*** of the ***Tax Administration Act 28 of 2011*** on an ex parte and *in camera* basis for the preservation of certain assets belonging to Dean Rees ("Rees") and Doggered Investments (Pty) Ltd ("Doggered"). In the Founding Affidavit in the application for the preservation order SARS stated that Rees was indebted in the amount of R 194, 423, 966.69 and that it sought to preserve these assets to secure such debts. Furthermore it stated that Doggered was Rees' alter ego and that it sought also to preserve its assets to secure the debt. Pursuant to the preservation order the First Respondent ("the curator *bonis*") took

control and possession *inter alia* of Doggered's 322 shares ("the shares") in Promac Paints (Pty) Ltd ("Promac"). The Court granted the Trustees leave to intervene on 29 September 2014, and the Trustees instituted the present application for an order excluding the shares from the operation of the provisional order, and discharging the order in respect thereof, on the basis that the Sherriff had already attached them in August 2011. This occurred in terms of the Court order that the Trustees obtained in July 2011 to found or confirm the Court's jurisdiction in their action against Rees and Doggered ("the attachment order"). In that action, the Trustees sought the setting aside and repayment to the estate of approximately R 160 million that Tannenbaum had paid to Rees in the course of his and Rees' operation in an illegal Ponzi Scheme. On behalf of the Applicants Mr Badenhorst SC submitted that there were three issues to be determined in this opposed application:

1.1

Firstly whether SARS made a full and frank disclosure to the Court in applying for the provisional order on an ex parte basis on 6 August 2014. If it did not, the Court had a discretion to discharge the provisional order which, he submitted it should do;

1.2

Secondly, if the Court did not discharge the provisional order for reasons of non-disclosure, whether SARS had established that Doggered was Rees' alter ego and therefore that its shares should be included into the preservation order. He submitted that SARS did not establish this, and that there was no basis upon which the shares should have been included in the preservation order;

1.3

Thirdly, if the provisional order was not discharged and if the Court found that SARS did establish that Doggered was Rees' alter ego, whether the Trustees had attached the shares in August 2011 in terms of the attachment order. He submitted that it was common cause that if the Trustees had done so, the curator *bonis* was not entitled to take possession and control of the shares on 13 August 2014 in terms of the preservation order.

2.

On behalf of SARS Mr B. Swart SC submitted that on a proper analysis of the

affidavits there was only the third issue for me to decide. I have analysed the affidavits in the context of this contention and I agree with him. I do not intend therefore to deal with the merits of the first two issues that Mr Badenhorst SC had raised.

3.

Did the Trustees attach the shares in August 2011?:

On 3 August 2011, pursuant to obtaining the attachment order, the Trustees instructed the Sherriff to attach the shares. It specifically authorised him to do so at the address specified therein. The Sherriff allegedly attached the shares at such address *inter alia* by notifying Promac (i.e. the Company in which Doggered held the shares) of the attachment order, and issued a notice of attachment (a copy of which he provided to Promac) wherein he recorded: "I attach *ad fundandam iurisdictionem* alternatively *ad confirmandam iurisdictionem*...[Doggered's] shares and loan account in the amount of R 5, 961, 103 [Promac] at care of Henk Strydom of Strydom Bredenkamp." The Trustees, Promac and Doggered acknowledged that the

shares were attached in the aforesaid manner. SARS and the curator *bonis* contend that the attachment was neither proper nor lawful because it did not take place at the *situs* of the share register or share certificates, and because the Sherriff did not take the certificates into his possession or cause an entry to be made into Promac's share register. Mr Badenhorst SC submitted that there was no requirement in the ***Uniform Rules of Court*** to support this contention. He argued that the essential requirement for the attachment of shares in a company for the purpose founding or confirming jurisdiction was that notice of the attachment must be given to the company. It was common cause that notice of the Sherriff's attachment was given to Promac, as well as Doggered and the Trustees, none of whom had ever disputed its validity, so he argued. In the circumstances he submitted that the attachment of the shares was valid, and that the curator *bonis* was not entitled to take possession and control thereof. On behalf of First Respondent, the curator *bonis*, it was argued that ***Rule 45 (8)*** applied to the present dispute, and that for purposes of an effective attachment of shares, there had to be compliance with the provisions of ***Rule 45 (8)***. Such attachment would only be complete once the Sherriff had given notice of the

attachment in writing "all interested parties" and had taken possession of the shares certificates, or had certified that he could not locate them despite a diligent search. Mr Labuscagne SC further contended that an attachment of incorporeal property required the Sherriff to attach the document evidencing such rights. An incorporeal moveable asset could not be attached merely by the intention or decision of the Sherriff. Though the right was incorporeal, some document or similar item representing the right had to be attached. In this context he relied on the decision of ***Badenhorst vs Balju, Pretoria Sentraal en Andere 1998 (4) SA 132 (T) at 141 B, 141 D and 141 F***. I will deal with this decision which was concerned with ***Rule 45 (8)*** hereunder. He also pointed out that the shares certificates or shares register was not kept at the address of Strydom Bredenkamp. Mr Swart SC on behalf of SARS associated himself with this argument and therefore contended there had been no valid attachment on 3 August 2011.

Mr Badenhorst SC in turn argued ***Rule 45 (8)*** only applies to execution proceedings. He referred me to ***Form 18*** in this context, which, as per the heading, and its wording, referred to "Writ of Execution". He stated that all that was required was

written notice and that this had been given to relevant interested parties. He agreed that physical possession of the shares certificate had not been proven but that this was not necessary.

4.

The history of our law of arrest to found jurisdiction is to be found, amongst others in the ***South African Law Journal, Vol 24, 1907 at 390*** written by ***A. W. Wessels***. The ***Administration of Justice Act No 27 of 1912*** per s. 5 made provision for an attachment to found jurisdiction where a defendant resided within the Union of South Africa. In s. 6 of the ***Act*** it separately provided for writs of arrest of a person to be executed throughout the Union. Prior to that, the various proclamations of the separate colonies, later provinces, did not provide for separate Rules relating to attachment to found or confirm jurisdiction. For instance, ***Proclamation 17 of 1902***, which created the Office of Sherriff of the Transvaal, only provided for such Sherriff to execute all the sentences, decrees, judgments, writs, summonses, rules, orders, warrants and commands as well as processes of any Superior Court. Similar

provisions can be found in the ordinances of the other colonies. These provisions were all repealed by the ***Supreme Court Act 59 of 1959*** by its second Schedule. In s. 4 (c) the Act made provision for an order of Court to found jurisdiction. The ***Supreme Court Act of 1959*** was wholly repealed by the ***Superior Courts Act No 10 of 2013***. This Act only provided in s. 28 that no attachment of property to found jurisdiction shall be ordered by a Division against a person who is resident in the Republic. ***Section 36 of the Supreme Court Act*** dealt with execution of a process and this topic is dealt with in ***Part 3 of the Superior Courts Act.*** Sections 42 and 43 in particular deal with execution of process by the Sherriff. ***Section 43 (1)*** reads as follows: "The Sherriff must, subject to the applicable rules, execute all sentences, judgments, writs, summonses, rules, orders, warrants, commands and processes of any Superior Court directed to the Sherriff and must make return of the manner of execution thereof to the Court and to the party at whose instance they were issued." It reads much the same as the old ***Transvaal Ordinance*** already referred to.

5.

It is abundantly clear that ***Rule 45 of the Uniform Rules*** deals with a writ of execution in respect of "generals and movables". As far as incorporeals are concerned these are dealt with in ***Rule 45 (8), (9) and (10)***. This Rule does not deal with attachment found or confirm jurisdiction. ***Herbstein and Van Winsen, the Civil Practice of the High Courts and the Supreme Court of Appeal in South Africa Fifth Edition, Juta, Vol 1*** deal with attachment of property to found or confirm jurisdiction in chapter 3 at p. 94 and further. They say quite correctly that the Rules which govern High Court procedure do not deal with attachments, but that the ***Supreme Court Act*** prohibits attachments in respect of a person who is resident within the Republic. I mentioned that the ***Superior Courts Act No 10 of 2013*** has a similar provision.

6.

The topic of execution procedures against movable property and money in the High Court by way of attachment is very usefully dealt with in the ***Sherriff's Handbook, A***

Practical Guide for Sherriffs and Deputy Sherriffs by - Lexis Nexis at 15 - 21.

Attached property must be taken into custody by the Sherriff, subject to the provisions of s. 45 (5). As I have said, the question really is whether the provisions of Rule 45 apply, and if they do not, what is required by the Sherriff, apart from the fact that he has to give notice to the relevant interested parties. I do not agree with Mr Labuscagne SC and Mr Swart SC that the provisions of Rule 45 are relevant to the present issue between the parties. I however also do not agree with Mr Badenhorst SC who submitted that no actual possession of the relevant property was required in attachment proceedings to found or confirm jurisdiction. ***Herbstein and Van Winsen*** supra, when saying that the Sherriff must attach property specified in the particular writ, refer to "Form H" of the Second Schedule to the Rules in this context. "Form H" as per its own wording is for "writ of attachment – *ad fundandam iurisdictionem*". In contrast "Form 18" in the First Schedule to the Rules deals with a "writ of execution". The question remains what does "attached" or "attachment" mean in this specific context? It cannot merely mean that the Sherriff intends to exercise some form of control.

7.

What was the purpose of attachment?:

Erasmus, Superior Court Practice at A 1 - 31 say that the purpose of an attachment of property *ad fundandam iurisdictionem* is twofold: first, to found, i.e. create jurisdiction where no other ground of jurisdiction exists at all, and, secondly, to provide an asset in respect of which execution can be levied in the event of a judgment being granted in favour of the Plaintiff. The purpose of an attachment of property *ad confirmandam iurisdictionem* is to strengthen or confirm jurisdiction which already exists. In this case, too, the object is to furnish an asset on which execution can be levied in total or partial satisfaction of the Plaintiff's judgment. In ***Reinhardt vs Rieke and David 1905 TS*** an order attaching a portion of the Applicant's interest in a mortgage bond *ad fundandam iurisdictionem* was granted by the High Court. The original bond was in the possession of its rightful owner, who was resident abroad. A copy of such bond was thereafter attached and sold in execution of a judgment against the bond holder by default. It was held that the absence of the original bond and its non-attachment invalidated the sale, after a

copy of the bond that had been attached had been sold in execution of a judgment against the bond holder by default. The Full Bench mentioned that the Sherriff had obviously not taken possession of any document at all under his writ of execution, or else he had attached and subsequently ceded a mere informal copy. In this case his action was irregular. The crux of this decision in the present context is that non-attachment invalidated the sale in this case. (at 188)

The decision of ***Thermo Radiant Oven Sales (Pty) Ltd vs Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 AD***, is also of particular relevance. This was an appeal from the Full Court of the Transvaal Provincial Division in the judgment of which the following appeared, and was held to be sound reasoning by the Appellate Division:

"It must be observed that attachment to found or confirm jurisdiction is not based on statutory provision but on the common law. There are no exact requirements for the form of the writ. The Supreme Court Rules contain no express provision for attachment *ad fundandam* (or *confirmandam*) *iurisdictionem*, but they do contain a form of such attachment, which is Form H. that form provides space for setting out "the cause of action", and not "the relief claimed". This passage is another answer to

the Respondents' contention that the provisions of Rule 45 are applicable in the present case, which I have already said that they are not. The judgment of the Appellate Division also deals in some detail with the origin and purpose of an arrest *fundandam iurisdictionem* and it is clear from the old authorities referred to, amongst others ***Rothschild vs Lowndes, 1908 TS 493 at 497***, that "the object is to lay an arrest upon some asset within the jurisdiction belonging to the Defendant, which is his property, and which is capable of being sold to satisfy the judgment of the Court." In my view it is clear, and also logical, having regard to the purpose of an attachment, that some type of restraint must be imposed on the particular asset. ***Herbstein and Van Winsen*** supra Vol 2 say at 1021 that upon due attachment of the goods of a judgment debtor, the possession, custody and control of such goods pass into the hands of the officer entrusted with the execution of the warrant of execution. This dictum in my view also applies to attachment to found or confirm jurisdiction, having regard to the purpose thereof. In ***Birgitta Weaving (born Schmidt) and Dieter Schmidt Case no 79/07***, a judgment delivered on 10 August 2007, Desai J held that ***Rule 45 (8)*** has no application to attachment to found or

confirm jurisdiction. I agree with that conclusion contained in the judgment. The common law deals with such attachments, as I have already said and in that respect I do not agree with the submissions made by the Respondents herein. The judgment was taken on appeal and overruled, but only on the basis that actual notice of attachment had to be given. The decision of ***Badenhorst vs Balju, Pretoria Sentraal en Andere 1998 (4) SA 132 T***, is in this context distinguishable inasmuch as it dealt with the provisions of ***Rule 45 (8)***. In that specific context it was held that attachment cannot merely be achieved by the intention of the Sherriff.

In my view, having regard to the purpose of attachment and the requirements of the common law, it is clear that an actual attachment is required to found or confirm jurisdiction. There must be the element of possession or control present. It is common cause that this did not occur herein.

The result is that the application is dismissed with costs including the cost of Senior Counsel.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 55517/14

Counsel for the Applicants: Adv C. Badenhorst SC

Adv G. D. Wickins

Instructed by: Brooks & Braatvedt Inc

Counsel for the 1st Respondent: Adv E. Labuscagne SC

Instructed by: Adams & Adams

Counsel for the 2nd Respondent: Adv B. Swart SC

Instructed by: Mahlangu Attorneys Inc

Date of Hearing: 5 August 2015

Date of Judgment: 26 August 2015 at 10:00