IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: 3092/2015
DATE HEARD: 01/09/2015
DATE DELIVERED: 10/09/2015

In the matter between

SYNTEC GLOBAL INCORPORATED	**1ST APPLICANT**
LIVE ELITE (PTY) LTD	**2ND APPLICANT**

And

BAXOTYPE (PTY) LTD	**1ST RESPONDENT**
THE SHERIFF OF THE HIGH COURT	**2ND RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] This is an application, brought as one of urgency, to set aside the order granted *ex parte* by Revelas J on 11 August 2015 in terms of which the first respondent (Baxotype) was authorised to institute proceedings against the first applicant (Syntec) by way of edictal citation for payment of certain sums of money, and the Sheriff of the High Court was authorised to attach, *ad confirmandam jurisdictionem*, all stock in trade belonging to Syntec in the possession of the second applicant (Live Elite) at its principal place of business in Johannesburg. Baxotype

was to institute the action within 30 days of the order. The attachment has taken place and it is common cause that the stock attached is the property of Syntec.

[2] Baxotype is an *incola* of this court and Syntec is a *peregrinus*, situated in the state of Utah, United States of America. Live Elite is registered and incorporated in terms of the company laws of South Africa, and is wholly owned by Syntec. Syntec markets various products in South Africa and Live Elite is its exclusive distribution agent in South Africa. Products are sent to Live Elite from the USA for distribution to customers who have placed orders. Live Elite provides Syntec with a record of products sold in South Africa and Syntec pays Live Elite commission on the products sold.

[3] The deponent to the founding affidavit in Baxotype's *ex parte* application, Gavin Victor, set out details of its claim against Syntec. Baxotype's particulars of claim are annexed to the answering affidavit in the present application and encapsulate Victor's averments. It is alleged that Baxotype was previously Syntec's exclusive agent in South Africa. In terms of the agency agreement Baxotype would receive funds from distributors who sold Syntec's products and Baxotype would pay Syntec certain amounts from those funds, namely certain amounts per distributor, a percentage of total monthly sales, and the costs of goods. It was a tacit term of the agency agreement that in the event of distributors paying Syntec directly instead of paying Baxotype, the portion of the purchase price paid by the distributor to Syntec directly would be repaid to Baxotype, as well as the portion of the purchase price which Baxotype was entitled to retain as profit. In this respect the amount of $637 920.12 is claimed. Baxotype's further claim is for damages for breach by

Syntec of the agency agreement, in that it unlawfully terminated the agreement prior to its expiry. The amount of R1 020 204.00 is claimed, calculated on the basis of Baxotype's gross profits it would have earned for the unexpired period of the agreement. It was not in dispute that Baxotype's cause of action arose within the jurisdiction of this court.

[4] The founding affidavit in the present application was deposed to by the applicants' Johannesburg attorney Marilize Jerling. She set out the grounds for urgency. As a result of the attachment Live Elite cannot trade because it cannot handle its stock and the applicants are unable to trade with the stock which has been attached. It will take more than a month for new stock to reach South Africa from the United States and during this time the business will lose thousands of rands. In the meantime Live Elite needs to meet its obligations in the form of salaries for its staff and rent for the premises it occupies. Live Elite is losing income and customers on a daily basis because it is unable to meet its clients' orders. If it cannot operate and earn a profit from the sale of stock it will not be able to meet its liabilities and may have to close down. Although Syntec runs a profitable business, it cannot sustain these losses. Jerling further stated that should Baxotype succeed in its action, any order obtained against Syntec can be enforced "with relative ease" in the USA.

[5] Jerling alleged that there was a dispute between Syntec and Baxotype which led to the termination of the agency agreement. Baxotype owes Syntec $193 013.54 and Baxotype, in a written document, has admitted indebtedness of a portion of this sum, namely $76 562.40. Accordingly, so it is alleged, Baxotype's prospects of success in its action are slim. In the answering affidavit Victor denied that Baxotype

owed money to Syntec and stated that he signed the acknowledgment of debt as a result of a misrepresentation on the part of Syntec.

[6] The application was opposed *inter alia* on the ground that it was not urgent. In view of my decisions on the various grounds on which the application was brought, it is not necessary for me to deal with the question of urgency.

[7] *Harms* Civil Procedure in the Supreme Court at A-30 sets out the following requirements which must be satisfied in order to succeed with an attachment *ad confirmandam jurisdictionem*:

(a) a *prima facie* cause of action against the other party;

(b) that the other party is a *peregrinus*;

(c) that the property in which the *peregrinus* has an interest is within the Republic;

(d) that the cause of action arose within the jurisdiction of the court.

[8] With regard to a *prima facie cause* of action *Harms* further states at A-31:

> "The requirement of a *prima facie* cause of action is satisfied if an applicant shows that there is evidence, if accepted, that will establish a cause of action. The mere fact that the evidence is contradicted does not disentitle the applicant to relief, not even if the probabilities are against him. It is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused."

[9] If an applicant satisfies the above requirements, a court has no discretion to refuse an attachment. (*Harms* at A-31.)

[10] Apart from the allegations of the poor prospects of success of Baxotype's claim (no *prima facie* cause of action), the applicants seek the setting aside of the order on two further grounds: lack of jurisdiction of this court to order the attachment, and non-joinder of Live Elite.

Prima facie cause of action

[11] The allegations in the particulars of claim reveal a cause of action in contract. It is notable that Syntec in its founding affidavit did not deal with Baxotype's allegations concerning its claim and merely mentioned that it was owed money by Baxotype, and that Baxotype had acknowledged a portion of the alleged indebtedness. Victor dealt with the document in which indebtedness was acknowledged and there is clearly a dispute in this regard. It therefore cannot be said that it is clear that Baxotype has no action or cannot succeed. I am satisfied therefore that this requirement was established.

Lack of jurisdiction

[12] This ground is based on the provisions of s 21 (3) of the Superior Courts Act 10 of 2013 as compared to the provisions of s 19 (1) (c) of the Supreme Court Act 59 of 1959. S 19 (1) (c) of the Supreme Court Act provided:

> "(1)(c) Subject to the provisions of section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act 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."

S 21 (3) of the Superior Courts Act provides:

> "Subject to section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), any Division may issue an order for attachment of property to confirm jurisdiction."

[13] It was submitted on behalf of the applicants that because s 21 (3) of the Superior Courts Act does not contain the extension provided in s 19 (1) (c) of the Supreme Court Act, namely that the property to be attached need not be situated within the jurisdiction of the court ordering the attachment, the common law jurisdiction of the court must prevail. That means, so it was submitted, that the court with jurisdiction to order the attachment must be the court where the property to be attached is situated (the *forum rei sitae*).

[14] If this argument was upheld, it would mean that s 21 (3) of the Superior Courts Act was a reversion to the position prior to the enactment of s 19 (1) (c) of the Supreme Court Act. *Herbstein & Van Winsen* The Civil Practice of the High Courts of South Africa at 112-113 explain the enactment of s 19 (1) (c) as follows:

> "This section was inserted into the Act in 1998 to address a limitation imposed by the courts upon themselves through the restrictive interpretation of certain legislative provisions. The limitation was that a court had no jurisdiction to order the attachment of property that was not within its area of jurisdiction even though the property was within the Republic. This rule was seen as frustrating the rights of *incolae* to enforce their claims in situations where the property of the peregrine debtor was within the area of jurisdiction of a court in which the *incloa* plaintiff did not live and the cause of action did not arise.
>
> For many years there were conflicting decisions on this issue. It was argued in many of these cases that section 26(1) of the Supreme Court Act, which provides that the civil process of a division of the Supreme Court shall run throughout the Republic, enabled courts to order attachment of property which was within the Republic, but outside their area of jurisdiction. Conflicting decisions were given

> by different provincial and local divisions of the then Supreme Court. The issue finally came before the Appellate Division in *Ewing McDonald & Co Ltd v M & M Products Co.*[1] The Appellate Division held that a court could not attach property outside its area of jurisdiction for the purpose of founding or confirming jurisdiction because section 26(1) was not intended to extend the jurisdiction of the courts. In *Siemens Ltd v Offshore Marine Eingineering Ltd*[2] it was held that the court of the area where the defendant's property was situated could not grant the order of attachment if there was no jurisdictional link between it and the matter.
>
> Before and after the *Ewing McDonald and Siemens* decisions, legal writers called for legislation to enable an *incola* plaintiff to attach the property or person of a peregrine anywhere in the Republic. The matter was investigated in 1993 by the South African Law Commission, which recommended an appropriate amendment to the Supreme Court Act. Section 19(1) of the Act was accordingly amended in 1998 by the insertion of paragraph (c) which allows a provincial or local division to order the attachment of property or the arrest of a person to found or confirm jurisdiction even though the property or person is within the area of jurisdiction of another provincial or local division provided that the property or person is that of a foreign *peregrionus."*

[15] It was submitted on behalf of Baxotype that the drafters of s 21 (3) did not intend to amend the existing law. I am in agreement with this submission. Bearing in mind the history leading up to the enactment of s 19 (1) (c) as discussed in *Herbstein & Van Winsen* (*supra*), a reversion to the pre-1998 position would be inexplicable. If, as was submitted, the common law prevailed in relation to jurisdiction in respect of movable property, there would simply be no point in s 21 (3) having been enacted at all. In my view the intention of the legislature in enacting s 21 (3) was to retain the jurisdictional position as provided in s 19 (1) (c). The words "any Division" support such an interpretation.

[16] This court therefore had the necessary jurisdiction to grant the order in respect of property which was situated outside its jurisdiction.

---

[1] 1991(1) SA 252 (A)
[2] 1993(3) SA 913 (A)

Non-joinder

[17] It was submitted that the attachment order has severely prejudiced Live Elite and that Live Elite should have been joined.

[18] In *United Watch & Diamond Co and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415E-H Corbett J (as he then was) said:

> "It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see *Amalgamated Engineering Union* v. *Minister of Labour*, 1949 (3) S.A. 637 (A.D.); *Koch and Schmidt* v. *Alma Modehuis* (*Edms.*) *Bpk.*, 1959 (3) S.A. 308 (A.D.). In *Henri Viljoen* (Pty.) *Ltd.* v. *Awerbuch Brothers*, 1953 (2) S.A. 151 (O), HORWITZ, A.J.P. (with whom VAN BLERK, J., concurred) analysed the concept of such a "direct and substantial interest" and after an exhaustive review of the authorities came to the conclusion that it connoted (see p. 169)—
> ". . . an interest in the right which is the subject-matter of the litigation and . . . not merely a financial interest which is only an indirect interest in such litigation".
>
> This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division (see *Brauer* v. *Cape Liquor Licensing Board*, 1953 (3) S.A. 752 (C)—a Full Bench decision which is binding upon me—and *Abrahamse and Others* v. *Cape Town City Council*, 1953 (3) S.A. 855 (C)), and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (see *Henri Viljoen's* case, *supra* at p. 167)."

[19] In my view Live Elite does not have a legal interest in the subject matter of the action. The subject matter of the action concerns the agreement between Baxotype and Syntec to which Live Elite is not privy. Any judgment the court might give in the action will not affect any legal interest of Live Elite. If for example Syntec is ordered to pay Baxotype the amounts it claims, such order will not affect the contractual relationship between Syntec and Live Elite and will not prevent Live Elite from enforcing any rights it might have in terms of its agreement with Syntec. The

attachment order may have affected Live Elite commercially but no legal interest has been prejudicially affected. The point of non-joinder therefore cannot succeed.

[20] Mr Whittington, who appeared for the applicants, consented from the bar to the jurisdiction of this court. Such consent will not undo the attachment (*Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA)).

[21] The applicants sought to rely on the decision in *Bettencourt v Kom and Another* 1994 (2) SA 513 (T) where Hartzenberg J said at 517C-E:

> "In the light of the principle that submission after attachment comes too late (see *Zakowski v Wolff* 1905 TS 32 and *Bedeaux v McChesney* 1939 WLD 128) 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 inequably 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 ease or otherwise of executing on a judgment in the country of domicile 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."

[22] In the present application little is said by Syntec about Baxotype's claim, Syntec's defence, or the prospect of execution in the USA (other than the bland statement that a judgment could be enforced "with relative ease"). Syntec holds itself out to be profitable and it is not incapable of replacing the attached stock to relieve its present position. In all these circumstances I am of the view that there are no grounds for disturbing the attachment order, as envisaged in *Bettencourt* (*supra*).

[23] It follows that all the requirements for an order *ad confirmandam jurisdictionem* were met and the application to set it aside cannot succeed.

[24] The application is dismissed with costs.

_____
J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: Adv D Whittington, instructed by Pagdens Attorneys, Port Elizabeth

For the 1st Respondents: Adv A Beyleveld SC, instructed by Brown Braude & Vlok Incorporated, Port Elizabeth