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Case No 277/92

**IN THE SUPREME COURT OF SOUTH AFRICA**

**APPELLATE DIVISION**

In the matter between:

**SIEMENS LIMITED** Appellant

and

**OFFSHORE MARINE ENGINEERING** Respondent

**CORAM:** Hoexter, Vivier, Eksteen, F H Grosskopf JJA et Van Coller, AJA

**HEARD:** 4 May 1993

**DELIVERED:** 28 May 1993

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**J U D G M E N T**

**HOEXTER, JA .....**

HOEXTER, JA

In an **ex parte** application the appellant unsuccessfully sought leave from the Eastern Cape Division ("the ECD") of the Supreme Court for the attachment **ad fundandam jurisdictionem** of certain movable property situate within the jurisdiction of the court **a quo**. With leave of that court the appellant appeals against its order refusing such relief.

The facts are these. The appellant is a company incorporated in South Africa with its head office and principal place of business in Johannesburg. In that city the appellant during 1990 sold and delivered electrical equipment to Offshore Marine Engineering Limited ("OMEL"), which is a company incorporated in accordance with the laws of the United Kingdom. OMEL has its registered office in the West Midlands of England. The appellant alleges that in respect of the sale and delivery aforesaid OMEL is

indebted to it in the sum of R66 769,60; and that despite due demand OMEL fails to make payment. The appellant wishes to institute an action in the ECD against OMEL for payment of the said amount.

OMEL is the owner of two moulds ("the moulds") used in the manufacture of marine survival craft. The moulds are stored on a farm in the East London district, and they are the property which the appellant sought to attach **ad fundandam jurisdictionem.** At the same time the appellant applied for leave to sue OMEL by edictal citation.

The appellant's notice of motion was supported by an affidavit by its credit manager. The deponent says that from an investigation carried out by him it appears that, apart from the aforementioned contract between the parties, OMEL -

> "....does not carry on business in the Republic of South Africa .... and does not have a registered office or principal place of business in the Republic of South Africa. Further, it

> would appear that the Respondent [OMEL] has no assets in the Republic of South Africa apart from the moulds .... I am not aware of the exact value of the moulds but estimate same to be in the region of R30 000,00...."

In **Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd** 1991(1) SA 482(A) it was pointed out that despite the creation of a single South African Supreme Court our judicial structure is in a sense a federal one. For the purposes of jurisdiction the status of a litigant as an "incola" or a "peregrinus" is determined by reference to his parochial link with the area of jurisdiction in which the action is sought to be instituted. Hence, in regard to the action which the appellant desires to institute against OMEL in the ECD, the appellant and OMEL are both **peregrini**; and the appellant is a **peregrinus** in the ECD notwithstanding the fact that it is an **incola** of the Witwatersrand Local Division ("the WLD"). Having regard to the nature of our judicial structure it is useful, on

occasion, to resort to a sub-classification of **peregrini.** A litigant neither domiciled nor resident in one Division of the Supreme Court who is nevertheless domiciled or resident in another such Division is sometimes described as a "local **peregrinus**" of the former Division. On the other hand a litigant who is neither domiciled nor resident in any Division of our Supreme Court is described as a "foreign **peregrinus.**" Applying this nomenclature it follows that in regard to the appellant's contemplated action in the ECD the appellant is a local **peregrinus** and OMEL is a foreign **peregrinus.**

In the case of **Ewing McDonald & Co Ltd v M & M Products Co** 1991(1) SA 252(A) the question arose whether one Division of our Supreme Court has jurisdiction to order the attachment **ad fundandam** or **confirmandam jurisdictionem** of property situate beyond its area of jurisdiction but within the area of jurisdiction of another Division. In

the unanimous judgment of this court, which was delivered by **Nienaber AJA,** that question was answered in the negative. In the course of his judgment **Nienaber AJA** (at 258C-259C) conveniently recapitulated those grounds (other than the ground of voluntary submission to jurisdiction) whereon a Division of the Supreme Court of South Africa will "according to current law and practice" assume jurisdiction in claims sounding in money. The first ground was stated as follows (at 258 D-F):-

> "(a) Where the plaintiff .... is an **incola** and the defendant .... is a foreign **peregrinus** (i e a **peregrinus** of the country as a whole) the arrest of the defendant or the attachment of his property is essential. Since a recognised **ratio jurisdictionis** by itself will not do it is immaterial whether such arrest or attachment is one **ad fundandam jurisdictionem** (where there is no other recognised ground of jurisdiction) or **ad confirmandam jurisdictionem** (where there is). The corollary of this rule is that an **incola** can pursue his claim where it is most convenient for him to do so,

namely within his own locality, even if his cause of action has no connection with that area other than the arrest or attachment. (See generally **Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd (supra** at 300 C-D); **Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation)** (supra at 889D).)"

**Nienaber AJA** stated the third ground thus (at 258I-259D):-

"(c) Where the plaintiff is a **peregrinus** (foreign or local) and the defendant is a foreign **peregrinus** both a recognised **ratio jurisdictionis** as well as an arrest or attachment are essential. Any arrest or attachment merely **ad fundandam jurisdictionem** would not be sufficient. To be sufficient the arrest or attachment must necessarily be one **ad confirmandam jurisdictionem.** (Cf **Pollak (op cit** at 52, 58, 62-3); **Herbstein and Van Winsen (op cit** at 40); **Maritime & Industrial Services Ltd v Marcierta Compania Naviera SA; NV Scheepsvictualienhandel Atlas & Economic Shipstores Ltd v Marcierta Compania Naviera SA** 1969(3) SA 28(D).)"

To the last-mentioned decision of the Durban and Coast Local Division reference will hereafter be made simply as

"the **Marcierta** case."

**Nienaber AJA** proceeded to point out (at 259 C-D) that although the rule enunciated by him in (a) had been expressly approved by this court, that stated in (c) had not. It is with (c) that the present appeal is concerned. Mr **Lowe**, who argued the appellant's case, conceded that the weight of authority in the decisions on the point in the Provincial Divisions supported the rule as formulated by **Nienaber AJA** in (c), but he submitted that in the decided cases supporting rule (c) the courts had tended to blur and to overlook the distinction between a plaintiff who was a foreign **peregrinus** and a plaintiff who was a local **peregrinus.** Counsel contended that in the latter case it was proper to regard the plaintiff as "an **incola** of the Republic of South Africa"; and as a matter both of principle and commercial convenience, so the argument proceeded, such a plaintiff should be afforded the right of

attachment **ad fundandam jurisdictionem** in the Division in which the property of the foreign **peregrine** defendant was to be found despite the fact that the plaintiff might be a local **peregrinus** of such Division, and despite the absence of any recognised **ratio jurisdictionis.**

The device of arresting the person of a debtor or attaching his property in order to found jurisdiction was unknown to Roman law, which rigidly applied the rule **actor sequitur forum rei:** an **incola** wishing to sue a **peregrinus** was obliged to seek the latter out in the jurisdiction of his domicile, and there to institute an action against him. Arrest **ad fundandam jurisdictionem** was peculiar to Germanic custom, but was borrowed and applied by Holland. It enabled an **incola** to escapé the inconvenience and expense of the **actor sequitur forum rei** rule. In **Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd** 1969(2) SA 295(A) the writings of the old authors who deal

with the topic are reviewed (at 305 - 307A) at some length in the judgment of **Potgieter JA,** some of whose observations in that case are quoted with approval in this court's judgment in the **Ewing McDonald** case (**supra**) at 257I - 258B. In the **Thermo Radiant** case **Potgieter JA** stated (at 305F) that arrest **ad fundandam jurisdictionem** "was conceived primarily for the benefit of the **incola.**" In the **Ewing McDonald** case it was described (at 257H) as "a procedural expedient" adopted by Holland in order to "assist its own **incolae.**"

Although the clear preponderance of judicial authority supports rule (c) as formulated by **Nienaber AJA** in the **Ewing McDonald** case, the judgments are not entirely harmonious. In particular the courts in Natal in earlier times, and over a period of more than half a century, consistently ruled that in order to found jurisdiction in Natal one **peregrinus** might attach the property of another

**peregrinus.** It may be useful, therefore, by reference to some of the leading cases, to attempt a brief review of the main currents of judicial thought on the subject in South Africa since the early years of the nineteenth century.

The old Cape case of **Hornblow v Fotheringham** 1 Menz 352, was heard in 1829. In an **obiter** the court expressed grave doubts as to the validity of an arrest of one **peregrinus** at the instance of another **peregrinus.** In **Wilhelm v Francis** (1876) Buch. Rep 216 **De Villiers CJ** in refusing to order the attachment of assets within the Colony for the purpose of founding jurisdiction remarked (at 219):-

> "The plaintiff and defendant both reside beyond the jurisdiction of this Court and the contract between them was not entered into in this Colony nor is it to be performed in this Colony."

**Wilhelm v Francis (supra)** was followed in the Transvaal in the case of **Cloete v Benjamin** 1 SAR 180 decided in 1884. **Kotzé CJ** (in whose judgment **Burgers J** concurred) said in

the course of his judgment (at 183):-

> "We have here the case of a contract entered into in the Cape Colony between parties not residing in this State, and not relating to any property situate in this State, nor has the contract to be carried out in this country. The applicant has referred us to **Story, Conflict of Laws** § 329, and **Van Leeuwen, R D Law,** bk 5, ch 7, § 1, who lay down the general rule that a creditor can arrest the person and property of his debtor wherever they may be found. But the question still remains, Can a person not residing in this State arrest the property of another, also not residing in this State, in order to found jurisdiction in a suit not directly connected with such property? A reference to **Voet** (2.4.22) shows that only a domiciled subject is entitled to an arrest of a stranger's property found within this State; this being an exception to the rule **actor sequitur forum rei,** introduced for the benefit and convenience of the citizens of the place where the arrest is applied for."

There may be mentioned next the oft-cited decision in **Einwald v The German West Africa Co** (1887) 5 SC 86. This involved a motion to attach goods belonging to the defendant in the Colony to found jurisdiction in an action for damages for wrongful dismissal. Both parties were

foreign **peregrini.** The contract had been concluded in Germany and had to be performed beyond the limits of the Colony. **De Villiers CJ** held that in the absence of any jurisdiction **ratione domicilii, ratione rei sitae,** or **ratione contractus,** the court ought not to assume jurisdiction by means of attachment of the defendant's goods.

The decision in **Einwald's** case was referred to with approval in the full Bench judgment **(Wessels, Mason & Curlewis JJ)** in the Transvaal case of **Springle v Mercantile Association of Swaziland Ltd** 1904 TS 163. It was there held that the plaintiff, a person domiciled in Swaziland and therefore not an **incola** of the Transvaal, was not entitled to arrest **ad fundandam jurisdictionem** property of a **peregrinus** situated in the Transvaal. In the course of his judgment **Wessels J** remarked (at 166) that "the **ratio** of the whole of Holland with regard to arrest is based upon

the utility accruing to inhabitants of the province of Holland...." A little later the learned judge proceeded to state (at 167):-

> "The case of **Einwald v German West African Co** gives us the Roman-Dutch law as it existed in Holland, and as it today obtains both in the Cape and here, and there it was stated that a foreigner cannot sue a foreigner in regard to a contract that has not to be performed within the territory, or whose origin is not from the territory, and that is the law we will apply here. Here we have a **peregrinus** suing a **peregrinus** with regard to a debt not contracted in this country, and of which this country is not the place of performance. Under these circumstances this Court has no jurisdiction."

The principle in **Einwald's** case was again approved in the Transvaal, albeit **obiter**, in **Lecomte v W and B Syndicate of Madagascar** 1905 TS 696. In that decision a full Bench (**Solomon, Wessels & Bristowe JJ**) reaffirmed the principle that where an **incola** attaches the property locally situated of a **peregrinus**, the arrest itself founds jurisdiction. However, **Solomon J** in the course of his

judgment (which was concurred in by **Wessels J**) took the opportunity of observing (at 699) that the decision in the **Einwald** case was entirely consistent with the decisions of the late High Court of the Transvaal. The learned judge stated the question which had fallen for decision in the **Einwald** case and remarked (at 699-670):-

> "To that question there could be only one answer upon the Roman-Dutch law authorities, and the court naturally refused to make an order attaching the property."

Of particular importance to the issue raised in the present appeal is the early decision of this court in **The Owners, Master and Crew of the SS "Humber" v The Owners and Master of the SS "Answald"** 1912 AD 546 ("the **Answald** case"). The facts were simple. At the mouth of the river Elbe a collision had taken place between a German vessel, the "Answald", and a British vessel, the "Humber", in consequence of which the latter and her cargo sank. When thereafter the "Answald" entered the port of Durban

the owners of the "Humber" obtained a rule **nisi** for the arrest of the "Answald" to found jurisdiction in Natal in an action for damages by edictal citation. In due course the rule **nisi** was discharged by the Natal Provincial Division ("the NPD"), subject to the deposit of security by the owners of the "Answald" for the due performance by the latter of any order which this court might make. The owners of the "Humber" appealed against the order of the NPD discharging the rule **nisi.**

The unanimous judgment of this court was delivered by **Innes ACJ.** The point to be decided on appeal, so explained **Innes ACJ** (at 553) was whether the NPD had -

> "....either apart from, or with the assistance of, the machinery of arrest, jurisdiction to entertain a personal action between two **peregrini**, in respect of a tort committed outside its territorial limits."

The appeal was dismissed with costs. Dealing with the

Dutch practice of arrest the learned Acting Chief Justice (at 555) remarked as follows:-

> "And springing as it did from considerations of commercial convenience, we find the machinery of arrest freely resorted to in cases where **incolae** of Holland were desirous of enforcing contractual rights against foreigners. But no authority was quoted to us, and we know of none, in support of the proposition that one **peregrinus** could in Holland arrest another **peregrinus,** so as to establish the jurisdiction of a Dutch court in an action founded upon a tort committed abroad. Nor is there any South African decision to that effect."

During argument in the **Answald** case counsel for the "**Humber**" had urged upon the court that it should recognise the authority of certain Natal cases (to which more specific reference will be made later in this judgment) to the effect that the Natal courts -

> "....had repeatedly assumed jurisdiction to entertain disputes between two **peregrini** where proceedings had been commenced by attachment, none of the ordinary **rationes jurisdictionis** being present."
> (per **Innes ACJ** at 555)

Having remarked that the Natal cases in question "go to startling lengths", **Innes ACJ** proceeded to say of them (at 556):-

> "But they were all cases of contract, and were expressly decided on that basis; and though it may become necessary on some other occasion to deal with the question of their validity, there is no need to do so now; for they are not authorities governing such a dispute as that with which we are at present concerned."

By the twenties of the present century the rule of practice reflected in rule (a) enunciated by **Nienaber AJA** in the **Ewing McDonald** case (**supra**) was already settled law in the Transvaal. In the Cape court decisions on the point had fluctuated - the affirmative answer given in **Dunell & Stanbridge v van der Plank** (3 Menz 112) which was decided in 1839 may be contrasted with the negative answer given by **De Villiers CJ** in the year 1907 in **Ex parte Kahn** (24 SC 558). However, in **Cape Explosives Works Ltd v South African Oil and Fat Industries Ltd; Cape Explosives**

**Works Ltd v Lever Brothers (South Africa) Ltd** 1921 CPD 244 ("the **Cape Explosives** case") **Kotzé JP** (at 271) affirmed "as a correct statement" of the modern law that South Africa had adopted the practice of granting -

> "....upon the application of an **incola**, an attachment of a foreigner or of his property found within the territorial limits .... on any just ground of action originating outside of such limits, in order to found jurisdiction."

Earlier in his judgment in the **Cape Explosives** case (at 268) the learned Judge President made the following observations in regard to the practice which had obtained in Holland when one foreigner sought to establish jurisdiction by the arrest of another foreigner:-

> "....we must remember that **strangers**, as well as **incolae**, could obtain an arrest in Holland; but there was this distinction between the two cases. A stranger could only arrest another stranger, if there existed some ground justifying the granting of an arrest, as where, for instance, the claim or right of action was based on a contract made or to be performed within the jurisdiction of the place, where the arrest was applied for; whereas an **incola** could arrest a stranger or **peregrinus**

on any cause of action arising anywhere beyond the jurisdiction."

Ten years after the judgment in the **Cape Explosives** case a full Bench of the Cape Provincial Division held in **Halse v Warwick** 1931 CPD 233 that **Ex parte Kahn (supra)** had been wrongly decided; and at the motion of an **incola** it granted an order attaching money to found jurisdiction in an action sought to be instituted against a defendant domiciled and resident in England for the payment of money due upon a contract both concluded and to be carried out beyond the Cape Province. The judgment of the court was delivered by **Watermeyer J** who embarked (at 235-238) upon a thorough examination of the Roman-Dutch authorities. He concluded that the standard Transvaal practice of allowing attachment at the instance of an **incola** was in accordance with the practice as it had existed in Holland, and as it was adopted in the early years of the Cape Supreme Court. Stressing the importance

of uniformity in the practice of the differenct courts of the Union, the learned judge found no reason why he should depart therefrom. However, **Watermeyer J** went on (at 239) to say the following:-

> "In suits between **peregrini**, there may be very good reasons why our South African Courts should not seek to extend their jurisdiction by an attachment, but in a suit by an **incola** against a **peregrinus**, why should South African Courts not come to the assistance of South African subjects and enable them to litigate at home just as the Dutch Courts came to the assistance of Dutch subjects?"

The last Cape decision which requires notice raised a problem similar to that which confronts the appellant in the instant matter. In **Frank Wright (Pty) Ltd v Corticas "BCM" Ltd** 1948(4) SA 456 (C) ("the **Corticas** case") the applicant was a company carrying on business in Johannesburg. It sought leave to attach **ad fundandam jurisdictionem** tiles in a Cape Town warehouse, the property of a Portuguese company, in an action for damages against

the latter for breach of contract. The application failed. Inasmuch as both parties were **peregrini** of the court **Searle J** declined to order such an attachment because a breach of contract had taken place either when the respondent shipped the defective tiles in Portugal or when it delivered documents relative to such tiles to the applicant in Johannesburg - either event having occurred beyond the jurisdiction. Having regard to the argument addressed to us by Mr **Lowe**, the following remarks (at 465) by **Searle J** are significant:-

> "Finally, Mr **Cohen** contends that under Roman-Dutch Law as administered in Holland a **peregrinus** was permitted to found jurisdiction against a **peregrinus** by arrest or attachment even where there existed none of the **rationes jurisdictionis** - a question by no means free from difficulties - **vide** Wessels, **History of R D L** at 649. He relies largely for this contention upon the conclusion of Dr Bodenstein in certain learned articles in **S A L J** (vol 34, p 198 **et seq**; p 457 **et seq**) which appears **prima facie** to have weighty support among the old authorities - **vide** van Leeuwen, **Roman-Dutch Law** (Bk. 5, ch 7, sec 3) **Cens. For.** (2.1.15.5); **Voet** (2.4.33); **Peckius.**

> **Handopleggen** (3.1, and 3.4); **Bort, Tract. van Arresten** (4.40 and 4.41; 2.1), etc. In my view, however, it is unnecessary to investigate this contention further, as, whatever the position was under the old law, this conclusion is not in accordance with the long standing general practice and law as laid down in the **dicta** and decisions of the Cape and other Courts (with the exception of certain distinguishable cases in Natal)....[here certain Cape and other decisions were cited] from which authorities, sitting as a single judge, I should not be justified in departing."

[The Cape and other decisions cited by **Searle J** in the above-quoted passage included the **Cape Explosives** case **(supra)**; **Einwald's** case **(supra)**; the **Answald** case **(supra)**; **Cloete v Benjamin (supra)** and **Springle v Mercantile Association of Swaziland (supra).**]

In regard to the point at issue the approach adopted in the **Corticas** case was expressly approved by **Murray J** in the WLD in **Kopelowitz v West** 1954(4) SA 296(W). In an application for attachment **ad fundandam jurisdictionem** the applicant was a **peregrinus** of the WLD

but an **incola** of the Union. The respondent was a foreign **peregrinus.** The contemplated action was based on a contract neither entered into nor performed within the area of the WLD. The court refused to order the attachment sought. **Murray J** said (at 301-2):

> "As the applicant is in my view a **peregrinus** in respect of the area of jurisdiction of this Court it seems to follow that, as none of the grounds exists giving this Court jurisdiction to entertain the contemplated action by him against West, he is not entitled to secure the desired order of attachment. In Pollak's **Law of Jurisdiction in South Africa** at p 62 the various South African decisions establishing this principle are cited, and the view is expressed that even though a different doctrine was formerly held in Natal, the earlier Natal view should not be regarded as departed from ...."

[In the last line of the passage quoted above the word "not" is clearly a typographical error. It is obvious from the context and from what is said by Pollak (**op cit** at 62-3) that what **Murray J** in fact said was "should now be regarded as departed from".]

In the survey attempted above the cases reviewed have been those of the Cape and Transvaal courts. For the sake of completeness I mention that the courts of the Orange Free State have likewise held that a **peregrinus** cannot obtain attachment of the property of a **peregrinus** to found jurisdiction in the absence of any of the recognised **rationes jurisdictionis.** See: **Ex parte Mosenthal and Co** 1907 ORC 23; **Tracey v Jones** 1911 OPD 75.

It remains to examine the earlier and dissonant Natal decisions. These are: **Beningfield & Son v Guardian Assurance and Trust Company of Port Elizabeth** 1872 NLR (Old Series-Morcom) 54 ("**Beningfield's** case"); **Menlove & Co v A Murray** 1881 NLR 116 ("**Menlove's** case"); **King and Son v Dewjbeebhou Jamel** 1887 NLR 129 ("**King's** case"); **Robson & Holton v W T Klonowski** 1904 NLR 159 ("**Robson's** case"); and **Alfred Morten v A M van Zuilecom** 1907 NLR 500 ("**Morten's** case").

In **Beningfield's** case judgments were delivered by each of three judges: **Harding CJ, Connor J** and (dissenting) **Phillips J.** The facts are unclear, the pleadings are convoluted (the defendants filed no less than 22 pleas and exceptions to the plaintiffs' declaration), and the **ratio** is obscure. A helpful discussion of the case is to be found in **The Annual Survey of S A Law** (1969) at 415-7. The learned writer correctly observes (at 415-6) that the report, which is in very small print, is not only difficult to read but also to understand. Beningfield & Son brought an action against the defendants for payment under a contract of insurance which had been effected at Port Elizabeth where the insurer was to make payment. The defendants argued that the plaintiffs' declaration "was bad in substance and law." One of the objections raised was framed thus (see at 55, second column of the report):-

> "And for a third plea the defendants said the attachment, upon which the plaintiffs founded

> their jurisdiction in this colony, was contrary to, and wanting the requisites in law necessary to sustain this action."

The plaintiffs excepted to the third plea (see 57, first column) for failing to aver in what respect the attachment was bad. According to the report (at 58-9) the Chief Justice ruled that this exception was well founded. **Connor J** concurred with the Chief Justice (at 59 second column):-

> "....and he would direct the third plea to be struck out, giving no leave to amend, because it was inconsistent to raise the question of attachment when pleading."

Frequently cited in later Natal cases are the following observations of **Connor J** (at 59 first column):-

> "There was no doubt that in questions of personal status the attachment of property did not help, but, in questions of contract it was settled by the Roman Dutch Law, though not by the Roman, that a person could maintain an action on a contract, no matter where it accrued, or where the contract was to be performed, provided only he arrested the defendant, or his property, in the country where he brought his action."

It is not easy to extract from the judgments in the **Beningfield** case any clear principle helpful to the issue in the present appeal. The chief difficulty flows from the fact that the report does not explicitly state whether or not the plaintiffs were **incolae or peregrini.** The uncertainty on this crucial point of the plaintiffs' status was only dispelled almost a century later when the **Marcierta** case **(supra)** was decided in 1969. To this matter I shall later return.

In **Menlove's** case **(supra) Connor CJ** ordered the attachment **ad fundandam jurisdictionem** of the goods of a non-resident defendant at the instance of the non-resident plaintiffs in respect of a debt incurred beyond the Colony of Natal. No argument was addressed to the court and in the very brief judgment no authority was cited.

**King's** case **(supra)** involved an exception to the court's jurisdiction under an edictal summons which had

been issued against the defendants who were residents of Zanzibar. **Connor CJ** dismissed the exception, apparently on the ground that the defendants had submitted to the jurisdiction of the court. The case hardly bears upon the issue under discussion because there had in fact been no attachment of any property to found jurisdiction.

In **Robson's** case (**supra**) the court was concerned with an action for the payment of money. The underlying contract had been made beyond the Colony and neither party resided within the Colony. The defendant was the owner of land at Vryheid which had been attached by an order of court to found jurisdiction. The court (**Finnemore ACJ, Broome AJ and Bird AJ**) gave judgment for the plaintiff. Counsel for the plaintiff relied upon the cases of **Beningfield, Menlove and King.** The defendant was in default. **Finnemore ACJ** observed (at 160) that in consequence of the attachment and on the authority of the

cases cited by counsel the plaintiff was entitled to judgment. **Bird AJ** remarked (at 161) that having regard to the cases of **Beningfield** and **Menlove** -

> "I think that we must take it that the court has practically decided that it has such jurisdiction."

**Morten's** case **(supra)** was also a full Bench decision. There had been "attachment, or its equivalent, an interdict" of the defendant's property in Durban. The plaintiff resided in London and the defendant alleged that he was a **peregrinus** domiciled in India. **Dove-Wilson JP** (at 507) quoted **Connor J's** statement of the Roman-Dutch Law in **Beningfield's** case and added:-

> "That view of the law has not only never been questioned in the Courts of the Colony, but has been recognised in subsequent decisions."

Citing the cases of **Menlove, King** and **Robson, Dove-Wilson** JP proceeded to say (at 507-8):-

> "No doubt it has been held elsewhere in South Africa that the Court ought not to assume

> jurisdiction merely by attachment at the instance of a peregrinus but this Court is bound by its own decisions. This ground alone is sufficient to establish the jurisdiction of the Court, and little need be said as to the other grounds on which it has been argued that the Court has jurisdiction."

It is noteworthy, perhaps, that despite the defendant's denials the court expressed as its opinion (at 509) that it was by no means clear that the defendant had not acquired a domicile in Natal. In addition the court was disposed to think (at 508) that there was a cause of action in Natal.

Insofar as attachment to found jurisdiction at the instance of a **peregrine** plaintiff is concerned the tide of judicial opinion in Natal began to turn when **Fielding v Sociedade Industrial De Oleos Limitada** 1935 NPD 540 was decided by a full Bench. In that case the plaintiff was an **incola** and the defendant a **peregrinus.** The court held (at 545) that it would not be justified in departing from the practice which had been established in Natal of

granting an incola the right to maintain an action against a **peregrinus** by arresting him or attaching his property in Natal, no matter where the contract had been concluded or where it was to be performed. **Lansdown** J (in whose judgment **Feetham** JP and **Botha** J concurred), having cited the cases of **Beningfield, Robson** and **Morten** pointed out (at 544) that in the Province of Natal -

> "....no distinction has been drawn in this connection between an **incola** plaintiff and a **peregrinus** plaintiff."

A little later in his judgment (at 545-6) the learned judge added:-

> "I wish, however, to guard myself here against any indication that this Court would be prepared to follow the practice at the instance of a plaintiff **peregrinus.** In this respect it appears to me that this Court has gone further than the Courts of the Transvaal or Cape and doubt has been thrown by the Appellate Division in **Humber's** case, **(supra)**, upon the correctness of the decisions which have extended the privilege to plaintiff **peregrini**, see, too, **Halse v Warwick** (1931) CPD at p 239. It is not necessary to decide the point here, but it may

> become necessary on some future occasion to deal with it."

The occasion thus anticipated by **Lansdown** J arose in the **Marcierta** case (**supra**). In that case attachment of a ship was sought to found jurisdiction. The applicants were **peregrini** and so were the respondents. The contemplated actions were based upon contracts which had been entered into and had to be performed beyond the Republic of South Africa. Having reviewed the earlier Natal decisions already discussed in this judgment, **Van Heerden** J correctly summed up the situation by stating (at 31F-G) that in Natal -

> "**Beningfield's** case forms the basis of the view that has since been held in Natal that mere attachment gives the Court jurisdiction to entertain an action between **peregrini** even if no other **ratio jurisdictionis** is present."

Thereafter (at 31H-32A) the learned judge proceeded to demolish the corner-stone on which the notion had rested:-

> "Though **Beningfield's** case was decided by a Bench

> consisting of three Judges whose decision would normally be binding on a single Judge, a reference to the papers in that case shows (although this does not clearly appear from the report of the case) that the plaintiff was Samuel Francis Beningfield, an auctioneer of Durban, trading under the style or firm of **Beningfield & Son.** Plaintiff was thus an **incola** within the Court's jurisdiction and, in so far, therefore, as the question which now falls for decision was decided in **Beningfield's** case, it was done **obiter** and the question now in issue still remains an open one."

In the **Marcierta** case **Van Heerden J** declined to grant the **peregrine** plaintiffs an order of attachment **ad fundandam jurisdictionem.** The learned judge was satisfied (at 32A-C) that the weight of decided authority in South Africa was against the granting of such an order. In addition the learned judge was swayed by considerations of practical expediency. At 34H he remarked:-

> "There seems to be no good reason why by mere attachment peregrine defendants should be put to the inconvenience and expense of defending actions in South African Courts at the instance of **peregrine** plaintiffs and why in the process the time of South African Courts (which may have

> to apply foreign law in deciding such disputes) and State funds should be taken up with disputes which are unconnected with South Africa and between persons who have no connection with South Africa."

The way has now been cleared for a closer examination of the merits of the present appeal. In vol 34 (1917) of **The South African Law Journal** H D J Bodenstein, then Professor of Roman-Dutch Law at the University of Amsterdam, contributed in two instalments an article entitled "Arrest to Found Jurisdiction". It is an erudite monograph involving a penetrating analysis of the Roman-Dutch authorities dealing with arrest to found jurisdiction. The first instalment (at 193-201) propounds the view (which modern South African law has accepted as an established principle) that in our common law arrest at the instance of an **incola** by itself is an independent **ratio competentiae**; and that our common law is accurately reflected in the maxim **arrest fundeert jurisdictie.** The second instalment

bears the heading "May one peregrinus arrest another". In it Professor Bodenstein undertakes a thorough examination (at 463-466) of the local laws at the time of the Dutch Republic. At 463 the learned author states:-

> "If we enquire into the Dutch practice, as evidenced by the local laws, and keuren of towns and territories, we find two distinct systems in regard to the matter under consideration. Some of these keuren allow strangers to arrest other strangers only under certain circumstances; according to others the right was granted generally, without any restriction or with slight restrictions merely."

At 466-7 the following is said:-

> "Now in all these keuren or costumen we have references to the right of strangers to arrest strangers which either expressly state that the right was not restricted, or imply that it was not otherwise restricted, or simply indicate the existence of the practice, without in any other way qualifying it, while in the former series we found statutes, etc., which expressly confined the right of arrest to the case when the **locus arresti** was at the same time the **locus solutionis.**"
>
> No doubt, if Judge Wessels [a reference to Wessels **History of the Roman-Dutch Law** (1908)

> Chapter XXV] had been aware of the existence of these costumen, he would not have said that the right of arrest was merely confined to **incolae**, and that the practitioners of Amsterdam, at the time of Bort, never for a moment thought of the possibility of an arrest of a stranger by a stranger.
>
> Then still the question remains, which set of keuren contains what has become in course of time our common law?
>
> The reply to this question can only be gathered from what is said by our writers, about the practice, in their times, in this respect. It is seldom specifically treated of by them; it seems to have been a matter of such common occurrence and so generally known that they did not take the trouble to deal with the matter in detail. Nevertheless we are in possession of sufficient **data** to conclude that the rule of the common law was, that the right of arrest was not confined to cases in which there was some other **ratio competentiae**, even if two strangers were the contending parties."

The conclusion to which Professor Bodenstein was thus impelled may usefully be contrasted with the views expressed in the **Cape Explosives** case (supra) at 268 mention whereof was made earlier in this judgment. It

will be recalled that there **Kotzé JP** (to whom reference is made by **Stratford CJ** in **Kerguelen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue** 1939 AD 487 at 504 as "the eminent Judge-President who was a masterly exponent of the Roman Dutch Law") described the practice in Holland in regard to **extranei** by saying (at 268):-

> "A stranger could only arrest another stranger, if there existed some ground justifying the granting of an arrest, as where, for instance, the claim or right of action was based on a contract made or to be performed within the jurisdiction of the place, where the arrest was applied for ...."

In two instructive articles written some forty years ago (see **South African Law Journal**, vol 70 (1953) at 226-229; vol 71 (1954) at 172-173) Professor Ellison Kahn conveniently dubbed as "the Natal rule" the doctrine which formerly held sway in Natal and according to which in a contractual claim sounding in money jurisdiction could be founded upon attachment of the defendant's property within

the court's area, without more, and irrespective whether the plaintiff was an **incola** or a **peregrinus.** In these articles the learned author expressed the view that the Natal rule is the correct one, and that (see 1954 **SALJ** at 171-2):-

> "....it would be far better if our courts, following the old authorities, were to hold that in a money action arising **ex contractu** brought by a **peregrinus** against a **peregrinus** jurisdiction could be based on arrest or attachment in the court's area **simpliciter,** in other words, if they were to adopt what is believed to be the Natal rule."

More recently, and in a very full note devoted to the Natal rule and the treatment thereof by **Van Heerden J** in the **Marcierta** case (see **The Annual Survey of SA Law** (1969) at 414-420), Professor Kahn further espouses the cause of the Natal rule. At 419 he writes:-

> "Bodenstein concluded that in the Roman-Dutch law arrest of person or goods was by itself a **ratio competentiae** not only where the plaintiff was an **incola** but also where he was a **peregrinus.** Pollak (p 52) is inclined to agree. The

> judgment of Innes ACJ in **The Humber v The Answald** does not canvass the Roman-Dutch legal writings properly. In a passage on page 556 that eminent judge showed his dislike of a rule that allowed one **peregrine** to hale another before a local court in a matter having no concern with it...."

Pointing out that the decisions of the Natal court upholding the Natal rule were all cases on contract, this court in the **Answald** case (at 556) expressly left open the question of the correctness of those decisions. There is force in the submission made by Pollak, **The SA Law of Jurisdiction** (1937) at 62-3, that because in so far as jurisdiction is concerned no distinction can be drawn between cases based on contract and those based on delict (as to which see also Bodenstein, **op cit**, at 468) the effect of the **Answald** case overrules the earlier Natal decisions. But having regard to what was said in the **Answald** case the technical position is doubtless that in the present appeal this court is unfettered by any authority which it is bound to accept and to act upon.

It is true that a series of venerable cases all decided in error cannot convert bad law into good law; and that the maxim **communis error facit ius** has been described as a dangerous one (see, for example, **Webster v Ellison** 1911 AD 73 per **Innes J** at 92). In **Dukes v Marthinusen** 1937 AD 12 **Stratford ACJ** stated (at 23):-

> "If the decisions had disregarded fundamental principles of our law, we might have to reassert those principles even at the cost of reversing judgments of long standing."

In the instant case, however, the point at issue, although it is of commercial significance, relates to what is essentially a rule of practice rather than a fundamental principle of the Roman Dutch law. A survey of the cases in the Transvaal, the Cape, the Free State, and latterly also in Natal, demonstrates a long and largely uniform chain of decisions contrary to the Natal rule. I would deem it inexpedient to interfere with such a long course of practice supported by the large bulk of cases decided over

a period of more than a century and a half. It is, I consider, too late in the day to contemplate such a course. It seems to me, with respect, that **Searle** J was right in ruling in the **Corticas** case (**supra**) at 465 that whatever the position may have been under the old law the long-standing practice is at variance with the Natal rule. In the forty-five years that have passed since the **Corticas** case was decided, that practice has become further entrenched in the modern law.

In these circumstances I do not think that it is necessary to delve into the original authorities and to re-examine the whole question. Even if the Natal rule correctly reflected the practice of arrest and attachment in Holland (as to which I express no opinion) I consider that this court should now pronounce that where the plaintiff and the defendant are both foreign **peregrini** (**extranei, uitlanders**) both a recognised **ratio**

**jurisdictionis** as well as arrest of the defendant or attachment of his property are essential to found jurisdiction.

It follows from what has been said above that in the **Marcierta** case (**supra**) **Van Heerden J** correctly refused to grant the foreign **peregrine** plaintiffs before him an order of attachment **ad fundandam jurisdictionem.** That finding, without more, does not dispose of the present appeal. Here the plaintiff is an **incola** of the WLD and a local **peregrinus** of the court below.

Mr **Lowe** did not invite us to endorse the Natal rule in its full breadth. Counsel argued that although the practice of arrest was an exceptional procedure, its purpose was primarily to assist the local inhabitants of the state in order to further the interests of local trade. In these circumstances, so the argument ran, it would be legally unsound and self-defeating to deny the procedure to

a plaintiff domiciled in the Republic of South Africa simply because the property sought to be attached was situate in a Division of the Supreme Court in which the plaintiff happens to be a local **peregrinus.** Counsel pointed out that in the case of a plaintiff domiciled within the Republic there was no room for the practical objections voiced by **Van Heerden J** in the **Marcierta** case (**supra**) at 34 H. It was said that in the **Corticas** case (**supra**) the significant distinction between a local and a foreign **peregrine** plaintiff had been insufficiently perceived; and that in the latter case the Cape Provincial Division erred in refusing relief to a plaintiff company which carried on business in Johannesburg.

The argument is not an unattractive one, but I do not consider that it can be sustained. The core of Mr **Lowe's** submission is that for practical purposes the appellant should be regarded as an **incola** of the Republic

as a whole. In the context of the problem which arises in the present appeal, however, it is artificial and legally inaccurate to describe a litigant domiciled in this country as an **incola** of South Africa.

It is true, of course, that the practical effect of decisions such as the **Corticas** case and the case of **Kopelowitz v West (supra)** is to inhibit access to South African courts by plaintiffs domiciled in South Africa. But courts must take the law as they find it. In pondering the "melancholy consequences" of the doctrine underlying the **Corticas** case Professor Ellison Kahn (1953 **SALJ, op cit,** at 228-9) illustrates its shortcomings by citing the following theoretical example:-

> "A, an **incola** of the Transvaal, sells goods to B, an **incola** of England, in Johannesburg, delivery and payment to be effected there. B does not pay within the specified time, and then goes to the Cape. He has no property in the Transvaal. He cannot be sued in either the Transvaal Provincial Division or the Witwatersrand Local Division, for he cannot be arrested to found

> jurisdiction, as he is not physically present in the area; nor has he property within the area which can be attached to found jurisdiction. He cannot be sued in the Cape Court, for the contract was not entered into there, nor did the cause of action arise there. No other South African court can possibly have jurisdiction."

However, as the learned writer himself points out (at 229):-

> "Admittedly responsibility for this lamentable state of affairs must in part be laid at the door of the judicial structure of the Union, at the absence of a true Supreme Court of South Africa."

I venture to suggest that the unfortunate plight of a South African litigant in the sort of situation exemplified by the facts of the instant case is a matter which should engage the attention of the Legislature. In this connection reference may profitably be made to a recent recommendation made by **The South African Law Commission** (Working Paper 47; Project 87).

However that may be I consider that in the current state of affairs this court should affirm as a

correct exposition of our law and practice rule (c) enunciated by **Nienaber AJA** at 258I-259D of the **Ewing McDonald** case (supra).

The appeal is dismissed.

G G HOEXTER, JA

VIVIER JA )
EKSTEEN JA )
F H GROSSKOPF JA ) Concur
VAN COLLER AJA )