



IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES/NO~~ *yes*
(2) OF INTEREST TO OTHER JUDGES: ~~YES/NO~~
(3) REVISED.

DATE

12/2/13

SIGNATURE

[Signature]

15/2/2013

CASE NO: 11747/2012

DATE:

IN THE MATTER BETWEEN

POINTER FASHION INTERNATIONAL CC

APPLICANT

AND

ADAMS & ADAMS ATTORNEYS

1ST RESPONDENT

DELUXE HOLDING AG

2ND RESPONDENT

COMMISSIONER OF COMPANIES AND
INTELLECTUAL PROPERTY

3RD RESPONDENT

SHERIFF OF THE MAGISTRATE'S COURT,
PRETORIA SOUTH EAST

4TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The applicant applies to file a supplementary or additional affidavit, as envisaged in terms of the provisions of rule 6(5)(e) of the Uniform Rules, after the prescribed set of affidavits has already been exchanged in the main application ("the main application") under the same case number featuring the same parties.

[2] It is convenient to quote the provisions of rule 6(5)(e):

"Within ten days of the service upon him of the affidavit and documents referred to in sub-rule (5)(d)(ii) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits." (Emphasis added.)

[3] The learned author Harms, *Civil Procedure in the Supreme Court* at B-53 offers the following useful and concise advice as to the approach to be adopted in respect of an application in terms of this sub-rule:

"While the general rule is that only the three sets of affidavits referred to above are permitted, the court may in its discretion permit further sets. The courts are inclined towards the view that the parties should be permitted to have the case adjudicated on the full facts. The court will not exercise its discretion in the absence of an explanation of why it is necessary to file the affidavit concerned and will always act subject to considerations of fairness and justice and the absence of prejudice to other parties. Leave to file further affidavits requires an indulgence from the

court and the applicant for such filing must show that he has not been *mala fide* or culpably remiss."

See the authorities listed in the relevant footnotes at B-54.

[4] The application is opposed by the first and second respondents. The third and fourth respondents did not play an active part in the proceedings before me.

[5] Mr Da Silva SC appeared for the applicant and Mr Preis SC assisted by Ms Kilmartin, appeared for the first and second respondents.

Brief background notes and a reference to the procedural history of the case

[6] The applicant is the erstwhile proprietor of five registered trade marks (and devices) in, *inter alia*, classes 3, 18 and 25. The names of the trade marks feature the word "Pointer" after the well-known Pointer dog, an illustration of which also forms part of the registered device or getup. I shall refer to these trade marks as "the Pointer trade marks". The Pointer trade marks were registered mainly in respect of leather articles of clothing, imitations thereof and accessories such as handbags, travelling bags, umbrellas and so on.

[7] The first respondent, a well known firm of attorneys also practising in the field of intellectual property, used to represent the applicant. However, a dispute arose between the first respondent and the applicant with regard to certain fees charged

by the former, and this resulted in the first respondent withdrawing as the applicant's attorneys of record during 2002. Thereafter, an action was instituted in the magistrate's court, Pretoria, under case no 25334/02, by the first respondent against the applicant for payment of fees and disbursements. In relation to this action:

1. a cost order was granted against the applicant in favour of the first respondent on 15 July 2005; and
2. default judgment, together with costs, was granted against the applicant in favour of the first respondent on 16 October 2006.

[8] It is appropriate to point out that the applicant did not, at any stage, seek a rescission of the judgment or challenge the validity of the judgment or the cost order granted. To date, the amounts due and payable to the first respondent by the applicant, running into tens of thousands of rand, remain unpaid.

[9] On 26 January 2006, the first respondent issued a warrant of execution based on the cost order of 15 July 2005 which the Sheriff attempted to execute at the applicant's then registered address in Claremont Cape Town on 1 February 2007 without success because the applicant had left the address. The first respondent never taxed a bill of costs in respect of the default judgment of 16 October 2006, believing that the applicant had no assets.

- [10] In the light of the inability of the first respondent to recover any **corporeal** movable or immovable property from the applicant, the Pointer trade marks were then attached by the third respondent on 2 September 2010 pursuant to the first respondent making application (on a form TM6 supported by the relevant documentation) in accordance with the provisions of section 41 of the Trade Marks Act, 194 of 1993 ("the Trade Marks Act") read together with regulation 41 of the Trade Mark Regulations.

It was submitted by counsel for the first respondent, correctly in my view, that the attachment of registered trade marks (which constitute **incorporeal** property) is specifically regulated by the Trade Marks Act and the Trade Mark Regulations and is therefore dealt with in terms of these provisions. There is no time bar in the Trade Marks Act for the bringing of such an attachment application. A debtor must also be given proper notice of such an application.

- [11] The applicant was given such proper notice of such application for attachment of the trade marks in July 2010. It is noteworthy that the application for attachment was not opposed by the applicant. The application was duly served on the erstwhile attorneys of the applicant.
- [12] The sheriff duly sold the Pointer trade marks in execution on 8 September 2011 to the second respondent pursuant to the attachment made in terms of the Trade

Marks Act. This was done under cover of the magistrate's court action case no 25334/2002.

[13] The details of the proprietor of the Pointer trade marks were changed by the third respondent on 4 November 2011 to reflect the second respondent as the proprietor thereof. On 8 November 2011 the first respondent, in writing, informed the applicant of the aforesaid developments.

[14] Almost three months later the applicant launched the main application.

The notice of motion, in part A thereof, contained prayers for urgent interdictory relief pending the outcome of the relief sought in part B of the notice of motion containing prayers for relief in the form of the setting aside of the sale in execution and ancillary relief. The application was set down for 6 March 2012 and heard on 7 March 2012.

The relevant prayers contained in part A are the following:

- "2.1 The second respondent be interdicted and restrained from alienating, assigning, transmitting, burdening, hypothecating or in any other way dealing with the trade marks listed in annexure A hereto (my note: these are the Pointer trade marks) and
- 2.2 this order be recorded as a caveat in the records of the third respondent against the trade marks set out in annexure A hereto."

The relief sought in part B of the notice of motion is, firstly, the setting aside of the execution sale of the Pointer trade marks on 8 September 2011 to the second respondent under the magistrate's court case no 25334/02; secondly "cancelling and/or setting aside the assignment/transmission or purported assignment/transmission" by the fourth respondent of the Pointer trade marks to the second respondent pursuant to the sale of 8 September 2011; and, thirdly, directing the third respondent to expunge and/or delete the "registration of transfer/assignment/transmission" of the Pointer trade marks in the name of the second respondent on 4 November 2011. There is also a prayer for the third respondent to be directed to reinstate the applicant as the proprietor of the Pointer trade marks.

The issues flowing from the main application

[15] For purposes of this rule 6(5)(e) application it is not necessary for me to pronounce upon the issues raised in the main application. A mere summary will suffice.

[16] The main thrust of the application, as it stands, for the relief mentioned, is based on the provisions of rule 41(7)(f)(i) of the Magistrates Court Rules which read as follows:

"(f)(i) Unless an order of court is produced to the sheriff requiring him or her to detain any movable property under attachment for such

further period as may be stipulated in such order, the sheriff shall, if a sale in respect of such property is not pending, release from attachment any such property which has been detained for a period exceeding four months."

It is argued on behalf of the applicant that at the time of the sale in execution the attachments had already expired pursuant to the provisions of this sub-rule. Therefore, so the argument goes, the sale in execution was unlawful and the goods sold under the purported sale were not under lawful attachment at the date of the sale.

This argument is countered on behalf of the first and second respondents on the basis that the sub-rule deals with movable property whereas a trade mark is not considered to be movable property – *Oilwell (Pty) Ltd v Protec International Ltd & Others* 2011 4 SA 394 (SCA) at 400A. Here the learned Deputy President stated: "Reverting to trade mark rights: like all other intellectual property rights they are territorial and akin to immovables."

- [17] It was also argued on behalf of the applicant that by reason of the fact that the sale was nothing more than a "purported sale in execution", which was unlawful, the provisions of section 70 of the Magistrates' Court Act do not find application, even if delivery of the goods took place pursuant thereto and the sale is not protected from subsequent impeachment. Section 70 reads: "A sale in execution by the messenger shall not, in the case of movable property after delivery thereof

or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect."

This argument is countered on behalf of the first and second respondents on the basis that section 70 relates to the sale in execution of **corporeal** movables and immovables and therefore irrelevant given that the subject of the sale was the Pointer trade marks. In any event, even if section 70 were to be applicable, there was no evidence that the second respondent acted in bad faith or with notice of a defect as foreshadowed by this section.

- [18] There was a third argument advanced on behalf of the applicant namely that the "assignment or transmission of the Pointer trade marks was invalid in the sense that it flew in the face of the provisions of section 30 of the Trade Marks Act in that one of the Pointer trade marks, argued to be 'associated' with those Pointer trade marks sold in execution, was in fact not sold or assigned and the aforesaid provisions prohibit assignment or transmission separately from 'associated' trade marks". This argument was countered on behalf of the first and second respondents on the basis that these provisions had been held to be directory and not peremptory and, in any event, the transfer of ownership following a sale in execution is not an assignment or transmission as envisaged in the Trade Marks Act.

- [19] I say no more about the merits, or lack thereof, of these arguments and counter arguments for present purposes.

The basis of the rule 6(5)(e) application and the court order of 7 March 2012

- [20] The applicant was inspired to launch the rule 6(5)(e) application because of yet another technical argument on the strength of which the sale in execution could be attacked, the details of which were only brought to the attention of the deponent to the supplementary affidavit on the day of the hearing on 7 March 2012 after her attorney was informed of the point the previous day by counsel.
- [21] The argument is based on the provisions of section 63 of the Magistrates' Court Act 32 of 1944 ("the Magistrates' Court Act"). The section is titled "execution to be issued within three years" and reads as follows:

"Execution against property may not be issued upon a judgment after three years from the day on which it was pronounced or on which the last payment in respect thereof was made, except under an order of the court in which judgment was pronounced or of any court having jurisdiction, in respect of the judgment debtor, on the application and at the expense of the judgment creditor, after notice to the judgment debtor to show cause why the execution should not be issued."

On the strength of this provision the applicant wishes to introduce an argument, in the proposed supplementary affidavit to be filed in terms of rule 6(5)(e), to the

effect that the default judgment of 16 October 2006 became superannuated as no warrant of execution was ever issued pursuant thereto, and the judgment of 15 July 2005 (the costs order) is also superannuated because more than three years expired between the last attempted execution on 30 January 2007 and the next steps to execute in terms of the provisions of the Trade Marks Act, whether it was the notice of the application for attachment of the trade marks in July 2010, or subsequent events such as the attachment by the third respondent on 2 September 2010 or the latest sale in execution on 8 September 2011.

- [22] The application to introduce this argument in the form of a supplementary affidavit, is opposed by the first and second respondents, *inter alia* on the basis of a failure by the applicant to adequately explain why the argument was not introduced in the first place, alleged *mala fides* on the part of the applicant and prejudice in that the respondents are now required to meet an entirely different case. There are also other arguments offered by the first and second respondents. As to the merits of the section 63 attack, the first and second respondents also argue that section 63 only applies in relation to attempts to execute in respect of movable and immovable **corporeal** property and that the provisions of the Trade Marks Act are those which apply and which requirements have been met, so that the sale cannot be attacked on the strength of section 63 of the Magistrates' Court Act.

[23] When the matter came before this court on 7 March 2012, and probably because of the attempted late introduction of the section 63 argument, the parties prepared a draft order which was made an order of court by agreement. In terms thereof the application was postponed *sine die* and, without prejudice, the first and second respondents undertook not to alienate or assign the Pointer trade marks pending the finalisation of part B of the application or the expiration of a period of six months from the date of the order, whichever occurs first. Of course, that period has by now expired. The second respondent also consented that the order can be recorded as a *caveat* in the records of the third respondent. It was specifically recorded that, with the exception of the question of urgency, the first and second respondents reserved their rights in regard to the points *in limine* raised by the first and second respondents. These points include an argument that this court has no jurisdiction to entertain the application. This is a subject which I will revert to hereunder.

In terms of the order it was also recorded that the sum of R200 000,00 paid into the applicant's attorneys' trust account would be allocated on behalf of the applicant for the payment of the costs order obtained in July 2005 and the judgment granted in October 2006 in the event that the sale in execution is set aside and the balance would stand as security for the first and second respondents' taxed costs in this application. The costs occasioned on 7 March 2012 were reserved to be determined by the court adjudicating part B of the application.

The argument *in limine* offered on behalf of the first and second respondents with regard to the question of jurisdiction

[24] At the commencement of the proceedings before me, I was urged by Mr Preis, correctly in my view, to first decide this argument relating to jurisdiction before deciding whether or not to consider the merits of the rule 6(5)(e) application.

[25] Already in the opposing affidavit to the main application, the first and second respondents, *in limine*, argued that this court does not have jurisdiction to grant the required relief against the second respondent. It was argued that the applicant should have attached the second respondent's trade marks in order to found the jurisdiction of this court in terms of section 41(2) of the Trade Marks Act because the second respondent is a foreign entity.

[26] It is alleged on behalf of the applicant in its founding affidavit in the main application that its registered address is in Upper Claremont Cape Town. It is accordingly not "resident" within the area of jurisdiction of this court. There is no indication that its main place of business is situated within the area of jurisdiction of this court: the deponent to its affidavits resides in Cape Town and it also makes use of the services of attorneys based in Cape Town.

[27] In the founding affidavit, it is also alleged that the second respondent is a company with limited liability, registered according to the laws of Switzerland, and having an address in Switzerland at Wallstrasse 13, 4010, Basel, Switzerland.

In addition, it is alleged that the second respondent's address for service and deemed *domicilium citandi et executandi* for the purpose of proceedings relating to the relevant entries in the Register maintained by the third respondent in terms of section 66 of the Trade Marks Act, is that of the first respondent in Lynnwood Manor, Pretoria.

- [28] By agreeing to the order of 7 March 2012, the respondents did not consent to or submit to the jurisdiction of this court. I have pointed out that it is stipulated in the order that the respondents reserve their rights with regard to their arguments *in limine*, including the jurisdiction argument. The following is also stated in Pollak *On Jurisdiction* p9:

"Submission to the jurisdiction of a court can take two forms. The parties may agree, either at the time of contracting with each other or when a dispute between them has arisen, to submit to the jurisdiction of a court. Alternatively, a defendant may, when sued in a court which would otherwise have no power over him, acquiesce in its jurisdiction. In each case the *onus* will be on the plaintiff to prove that the defendant has duly submitted either expressly or by conduct consistent only with acquiescence."

With reference to relevant authorities, the learned author also points out, on p9, that submission or consent *per se* is insufficient to confer jurisdiction on the court.

[29] The argument offered on behalf of the respondents is that this court does not have jurisdiction to entertain the relief sought against the second respondent, as it is a *peregrinus* of the republic. It was argued further on behalf of the respondents that before this court would have jurisdiction to consider the relief, it would be necessary for the applicant to apply to the court for the attachment of the Pointer trade marks in order to found and/or confirm jurisdiction against the second respondent. This has not been done. I have already pointed out that in the opposing affidavit to the main application the respondents already advanced this argument and suggested that the trade marks should have been attached in terms of the provisions of section 41(2) of the Trade Marks Act, in order to found jurisdiction.

[30] In both the opposing affidavit and the heads of argument offered on behalf of the respondents, this attack on the jurisdiction appears to be limited to the relief sought in part A of the notice of motion, namely an interdict restraining the second respondent from alienating, assigning, transmitting, burdening, hypothecating or in any other way dealing with its own trade marks, properly transferred to it by the third respondent as already illustrated. There is also the relief sought, in part A, for a *caveat* to be recorded in the records of the third respondent.

I have to confess that it is not clear to me why the attack on jurisdiction is limited to the relief sought in part A, neither was this question ventilated before me during the proceedings. The relief sought in part B is aimed at depriving the second respondent of its trade marks which it legally purchased at an execution sale, paid the purchase price and had the ownership thereof transferred into its name through a lawful process conducted by the third respondent. The second respondent clearly has a material interest in the outcome of the part B proceedings. As I have explained, the relief sought in part B is also aimed at setting aside the assignment or transmission of the trade marks by the fourth respondent to the second respondent and deleting the registration of the transfer or assignment of the trade marks by the third respondent into the name of the second respondent, thereafter reinstating the applicant as the proprietor of the Pointer trade marks. It is true that some of the relief sought in part B is directed at the fourth and the third respondents but it nevertheless materially impacts upon the rights and interests of the second respondent. I have difficulty in understanding how it can be argued that this court does not have jurisdiction to entertain the part A relief but does have jurisdiction to entertain the part B relief. The affected party remains the second respondent *peregrinus*.

- [31] In responding, in its replying affidavit, to the argument regarding jurisdiction offered by the respondents in their opposing affidavit, the applicant argues that the matter relates to trade marks which are registered with the third respondent within the area of jurisdiction of this court and any act of transfer of a trade mark, in the

records of the third respondent. will take place within the area of jurisdiction of this court which is the proper court to deal with the matter so that prior attachment of the trade marks is not necessary. It is argued that the part A relief includes an order for a *caveat* in the records of the third respondent who is within the area of this court's jurisdiction. Finally, as to the relief sought in part B, the applicant appears to agree with the respondents by stating "... the setting aside of the sale in execution, is clearly not one in which any possible attachment to found jurisdiction would be required. The interim relief is incidental to the main relief."

For the reasons already mentioned, I find it difficult to accept these arguments. In my view, in order to effectively exercise jurisdiction over a *peregrinus*, a court should, generally speaking, require attachment of property of that *peregrinus* in order to found or confirm jurisdiction.

[32] The position is explained as follows in Herbststein and Van Winsen *The Civil Practice of the High Courts of South Africa* 5th edition vol 1 p101:

"Where the plaintiff is an *incola* of the republic and the defendant is a *peregrinus* of the republic, the court will exercise jurisdiction on the following grounds:

- (i) that the cause of action arose within the court's area of jurisdiction and that property belonging to the defendant has been attached to confirm the jurisdiction (*ad confirmandam jurisdictionem*);

- (ii) that the plaintiff resides within the court's area of jurisdiction and property belonging to the defendant has been attached in order to found jurisdiction (*ad fundandam jurisdictionem*)."

The authority relied upon by the learned authors in this regard is the case of *Ewing McDonald & Co Ltd v M&M Products Co* 1991 1 SA 252 (A) at 258D-G.

It is clear, from the addresses cited in the founding affidavit, *supra*, that the applicant is an *incola* of the republic but does not "reside" within the area of this court's jurisdiction. It is also clear that the second respondent is a *peregrinus* of the republic. The fact that the second respondent chose an address for service for the purposes of proceedings relating to any entry made in the register of the third respondent, as pointed out, does not, in my view, alter the status of the second respondent as a *peregrinus*. No argument to the contrary was presented to me during the hearing.

- [33] I also consider the provisions of section 41(2) of the Trade Marks Act to be of some significance for purposes of deciding this issue relating to jurisdiction. It reads:

"41(2) A registered trade mark may be attached to found or confirm jurisdiction for the purposes of any proceedings before the Transvaal Provincial Division of the Supreme Court of South Africa or the magistrates' court for the district of Pretoria and may

be attached and sold in execution pursuant to an order of any such court." (Emphasis added.)

Judging by the wording of this subsection, it seems reasonable to assume that the legislature intended to decree, and did so, that a trade mark may be attached to found or confirm jurisdiction in an appropriate case.

The question, in my view, is whether this is an appropriate case to insist that these Pointer trade marks should have been attached in order to found or confirm jurisdiction.

[34] The learned authors, *Herbstein and Van Winsen op cit* at p105-108, under the heading "In respect of what type of claim is attachment necessary?" present a useful discussion on the subject. They summarise the general rule as follows:

"As a general rule, attachment is necessary whenever a party seeks to enforce a claim sounding in money against a person who is not resident within the Republic of South Africa, unless that person has submitted to the jurisdiction of a South African court. Some claims relating to property also require attachment or submission. Attachment to found or confirm jurisdiction has no application to matrimonial causes or actions *in personam* which do not have a monetary or property component."

"In my opinion the true position is that when the immovable property is situated within the Court's territory, the Court has jurisdiction wherever the defendant may be (see Pollak, *Jurisdiction* pp103 *et seq*) and therefore it is not necessary to attach the property as well as to obtain leave to sue by edict."

Jackaman was quoted with approval in the more recent case (also mentioned by the learned authors) of *Manna v Lotter & Another* 2007 4 SA 315 (CPD) at 319F-H. The fact that the learned judge, in *Jackaman*, held that an applicant is entitled to ask for attachment of the property in order to found jurisdiction does not mean that the applicant was obliged to do so.

In *Manna*, it was held that an attachment was not necessary in order to compel a *peregrine* defendant to transfer immovable property situated within the court's jurisdiction. The learned judge puts it as follows at 319C-D:

"Generally speaking, in any claim relating to immovable property – whether *in rem* or *in personam* – the court within whose territorial jurisdiction the property is situated (the *forum rei sitae*) will *always* have jurisdiction to entertain such claims. In such cases, it is then irrelevant whether the defendant is an *incola* or a *peregrinus*."

I do not propose repeating references to the relevant authorities to be found in the footnotes in this judgment at, *inter alia*, 318, 319 and 320.

[37] As already pointed out, it was argued, correctly in my view, on behalf of the respondents, that trade mark rights are akin to immovables. I was referred to *Oilwell (Pty) Ltd v Protec International Ltd & Others, supra*, at 400A where (as mentioned) the following is said:

"Reverting to trade mark rights: like all other intellectual property rights they are territorial and akin to immovables."

See also *Gallo Africa Ltd & Others v Sting Music (Pty) Ltd & Others* 2010 6 SA 329 (SCA) at 334E-G. From this authority it appears that an intellectual property right is limited to the territory of the state granting it.

[38] On behalf of the applicant, I was referred by Mr Da Silva to *Rembrandt Fabrikante & Handelaars (Edms) Bpk v Gulf Oil Corporation* 1963 3 SA 341 (AD). The case involved an application for rectification of the trade marks Register. The dispute still had to be adjudicated in terms of the provisions of the Designs Act 9 of 1960, but, in my view, the principles laid down in the judgment remain valid. An argument *in limine* claiming lack of jurisdiction over the *peregrinus* respondent, was dismissed by this court. The argument was upheld by the Appellate Division. At 348D-E the following is said:

"The first issue argued on appeal, is that of jurisdiction. The court below found that it had jurisdiction on more than one ground, one being that it is the *forum rei sitae*. It is not necessary to deal with any other ground."

After analysing some of the general provisions of Act 9 of 1916, the learned Chief Justice said the following at 348H:

"It is apparent from these provisions that, generally speaking, the existence of an exclusive right to a trade mark flows from and is dependent upon registration, and the nature and extent of such a right is determined by the entries in the register. The right to a registered trade mark is effectively assigned, transferred, modified, partly divested of its exclusiveness, or terminated, by such entries. It follows, I think, that it is situated where the register is kept ..."

At 349E-F, the learned Chief Justice comes to the following conclusion:

"In my opinion the court below correctly found that it had jurisdiction as the *forum rei sitae*."

In the *Trilingual Legal Dictionary* by Hiemstra and Gonin, 2nd edition, p200, the *forum rei sitae* is described as follows:

"Hof van die plek waar die saak geleë is/forum (court) of the place where the thing in question is situated."

The trade marks are still registered in the Register kept by the third respondent in Pretoria. The fact that they were sold in execution to a Swiss *peregrinus* does not, in my view, alter this state of affairs. It is also useful to revisit my earlier remark

about the *domicilium* address chosen by the second respondent in terms of section 66 of the Trade Marks Act. Section 66(2) reads as follows:

"The address for service furnished by an applicant in terms of this section shall be deemed to be the *domicilium citandi et executandi* of such applicant for the purposes of proceedings relating to any entry made in the Register in pursuance of the application."

[39] From the foregoing, it seems that it would be correct to accept that the Pointer trade marks constitute immovable property situated in Pretoria, within the area of jurisdiction of this court.

[40] Reverting to the discussion, *supra*, by the learned authors *Herbstein and Van Winsen*, relating to what type of claims require attachment to found or confirm jurisdiction, the authors also deal under "other claims" at 107, with interdicts. The following is stated by the learned authors:

"Where an interdict is claimed against a *peregrinus*, the court will have jurisdiction if, in the case of a mandatory interdict, the act is to be carried out in its area, or in the case of a prohibitory interdict, the act against which the interdict is claimed is about to be done in its area."

And, "... where a court does have jurisdiction to grant an interdict against a *peregrine* defendant, no attachment or submission is necessary".

It seems to me that the interdictory relief sought by the applicant in part A of the notice of motion, falls within the ambit of these observations. The learned authors rely on the authority of the judgment in *Kibe v Mphoko & Another* 1958 1 SA 364 (OFS) at 367A-C. In that case, both the parties were *peregrini*. It seems, however, from what is stated in the judgment at 367B-C, that, where the respondent is a *peregrinus*, "... it is however clear that in the absence of any attachment of respondent's personal property, no order for the payment of costs should be made against him".

[41] Against this background, I have come to the following conclusions:

1. This application is not a claim sounding in money. If I understood him correctly, Mr Preis also argued accordingly.
2. Where it is an application for the re-transfer of immovable property situated within the area of jurisdiction of this court, this court, as the *forum rei sitae*, has jurisdiction to entertain the application, even in the absence of an application for attachment to found or confirm jurisdiction.
3. This court also has jurisdiction to entertain the part A interdict application. This is subject to a possible argument as to costs, as I have pointed out.
4. Where these proceedings, in a real sense in my view, have a bearing on "any entry made in the Register ..." as intended by the provisions of section 66(2), *supra*, of the Trade Marks Act, it seems that the conclusions I have arrived at may well be fortified by the fact that the second

respondent had to choose a *domicilium* address in Pretoria in terms of the requirements of section 66.

[42] In the result, the argument *in limine*, regarding jurisdiction, falls to be dismissed, and I rule accordingly.

[43] I now revert to the merits of the rule 6(5)(e) application.

The merits of the rule 6(5)(e) application

[44] I have dealt with the reason why the application was launched, namely to enable the applicant to introduce a further legal argument based on the provisions of section 63 of the Magistrates' Court Act ("the section 63 argument").

[45] I have dealt with the issues flowing from this application and the arguments and counter-arguments advanced by the parties.

[46] I have quoted the useful summary provided by the author *Harms, supra*, with regard to the factors to be considered when confronted with an application of this nature.

[47] On a general reading of the papers I am satisfied that the deponent on behalf of the applicant only became aware of the section 63 argument on the morning of the hearing of 7 March 2012, and her attorney only the day before. The section 63

argument was raised in the heads of argument of the applicant handed to the respondents on 7 March 2012. Most, if not all of the evidence relevant to the section 63 argument (steps taken to bring about execution) already appears in the founding affidavit in the main application. This evidence was obtained from the respondents. The evidence was peculiarly within the knowledge of the respondents.

- [48] Revisiting the considerations applicable when dealing with an application in terms of this sub-rule, I see no indication of *mala fides* on the part of the applicant. I also am not persuaded that the respondents will in any way be prejudiced if the application were to be granted. Only a legal point is being taken. It is not a question of a whole new case having to be met, as suggested by the deponent on behalf of the respondents. The facts underpinning the legal point were already amply set out in the founding papers. The legal point itself, as I have indicated, was mentioned in the heads of argument delivered on 7 March 2012 and the supplementary affidavit, proposed to be filed in terms of the sub-rule, has been in possession of the respondents since 29 March 2012.

Moreover, in my view, it is arguable that the legal point can in any event be advanced even without a supplementary affidavit.

- [49] When they received advance notice and a copy of the proposed supplementary affidavit, the respondents objected thereto without furnishing a reason for the

objection. Indeed, in their opposing affidavit, they did not deal fully or satisfactorily with the steps that may have been taken to bring about execution. In heads of argument on behalf of the respondents it is submitted that they have not yet dealt with the issue of superannuation and will only be required to do so should the application be granted. In my view, this could have been done already in the opposing affidavit to this application. Nevertheless, when granting the application, as I propose doing, I will afford the respondents an opportunity to supplement their papers by dealing with the question of execution steps and superannuation.

- [50] I see no reason why the application should not be granted. I am alive to the remarks of *Harms, supra*, that courts are inclined towards the view that the parties should be permitted to have the case adjudicated on the full facts. Obviously, I express no view on the merits of the section 63 argument, or any of the other arguments advanced on behalf of the parties.

The costs

- [51] Given the background of the case, including the apparently undisputed debt owing to the first respondent for many years, and the relevant complexity of the case, with particular reference to the jurisdiction issue, I am not prepared to grant costs at this stage against the unsuccessful respondents in this rule 6(5)(e) application. It seems to me that the costs should be reserved to be determined by the court

adjudicating part B of the application, as was done in terms of the 7 March 2012 order.

The order

[52] I make the following order:

1. Leave is granted to the applicant to forthwith file the supplementary affidavit which is annexed to the notice of motion as annexure "A" and the aforesaid affidavit is to be received as evidence in the main application.
2. Leave is granted to the respondents, if so advised, to file a further affidavit dealing with the issue of superannuation, execution steps taken at the relevant time and related matters within fourteen days after filing of the supplementary affidavit.
3. Leave is granted to the applicant to reply to such further affidavit, if any, within ten days after the filing thereof.
4. The costs of this application are reserved for determination by the court adjudicating part B of the main application.



W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

11747-2012

HEARD ON: 5 DECEMBER 2012
FOR THE APPLICANT: C A DE SILVA SC AND D W GESS
INSTRUCTED BY: SPRINGER NEL ATTORNEYS
FOR THE 1ST AND 2ND RESPONDENTS: D A PREIS SC AND Ms L G KILMARTIN
INSTRUCTED BY: ADAMS & ADAMS