THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED. ✓
DATE 6/9/13 SIGNATURE

6/9/13

Case Number:35347/13

In the matter between:

MULTI-LINKS TELECOMMUNICATIONS LTD Applicant

and

AFRICA PREPAID SERVICES NIGERIA LTD Respondent

And Case Number: 30004/2013

In the matter between:

TELKOM SA SOC LIMITED First Plaintiff

MULTI-LINKS TELECOMMUNICATIONS LIMITED Second Plaintiff

and

BLUE LABEL TELECOMS LIMITED First Defendant

AFRICA PREPAID SERVICES (PTY) LTD Second Defendant

AFRICA PREPAID SERVICES NIGERIA LIMITED	Third Defendant
MARK PAMENSKY	Fourth Defendant
PERRY-MASON MTHUNZI MDWABA	Fifth Defendant
THAMSANQA (THAMI) GOODENOUGH MSIMANGO	Sixth Defendant

JUDGMENT

FABRICIUS J

1.

On 19 August 2013, in my capacity as case manager, I heard the opposed applications essentially concerning the questions whether or not this court has jurisdiction over Africa Prepaid Services Nigeria Limited ("APSN") in an action launched by Telkom SA and Multi-Links Telecommunications Limited ("Multi-Links") against Blue Label Telecoms Limited ("Blue Label") and others. The related question was whether "good cause" was shown for the relief sought by Multi-Links in terms of the provisions of section 3(2) of the Arbitration Act 42 of 1965 setting aside the arbitration agreement contained in a Super Dealer Agreement ("SDA") entered into between Multi-Links and APSN on 1 December 2008 and the expansion to the submission to arbitration dated 6 November 2012. I also have to decide a costs question relating to an *ex parte* order that Telkom and Multi-Links obtained from this court on 16 May 2013, which was subsequently set aside by agreement.

2.

The facts:

Counsel for Multi-Links and APSN have presented very thorough heads of argument to me in the abovementioned context, and I am grateful that I can rely on them to refer to the relevant facts and the parties' opposing submissions. The status of the relevant parties is set out in the particulars of claim Telkom and Multi-Links dated 17 May 2013 and it will be useful to briefly refer thereto. The first plaintiff in that action is Telkom SA, a state owned company in term of section 8(2)(a) of the Companies Act of 2008 and a major public entity in terms of Schedule 2 of the Public Finance Management Act 1 of 1999. The second plaintiff is Multi-Links Telecommunications Limited ("MLT") a public company incorporated in terms of the Nigerian Companies and Allied Matters Act, with its principal place of business in Nigeria. MLT was a subsidiary of Telkom from March 2007 to October 2011 and accordingly was also a major public entity in terms of Schedule 2 of the PFMA at the relevant time. The first defendant was cited as being Blue Label Telecoms Limited ("Blue Label") a public company listed on the Johannesburg Stock Exchange with its principal place of business in Sandton. The second defendant is Africa Prepaid Services (Pty) Ltd ("APS") a subsidiary of Blue Label, a private company with its principal place of business being also in Sandton. The third defendant is Africa Prepaid Services Nigeria Limited ("APSN") a company incorporated in Nigeria with its principal place of business also being in Lagos, Nigeria. It is alleged that APSN consented to its attorneys accepting service of the summons on its behalf. APSN is a subsidiary of Blue Label by virtue of Blue Label's 72 % shareholding in APS which in turn holds 51 % of the shares in APSN. The fourth defendant is Mark Pamensky an adult businessman employed at Blue Label's principal place of business in Sandton. Pamensky was at all material times the Chief Operating Officer of Blue Label and a director of APS and APSN, and represented these entities in the conduct which founds plaintiff's claim for damages against the defendants. The fifth defendant is Ndwaba also residing in Bryanston, Johannesburg who is the alleged sole beneficiary of "Citadela" and a director of APSN. The sixth defendant is Msimango residing in Bryanston, Johannesburg who was at all material times a managing director of Telkom International Business Unit, and a former director of MLT. As far as jurisdiction of this court is concerned, it is alleged that it has jurisdiction over the defendants and in respect of the causes arising referred to, in the particulars of claim by virtue of the following, and I need to set this out in some detail: All of the defendants save for APSN are persons residing or being in the area of jurisdiction of this court as contemplated in section 19(1) of the Supreme Court Act 59 of 1959. It is alleged that this court has jurisdiction to determine Telkom's claims against APSN by virtue of the following:

2.1

Telkom's claims against APSN are for payment of certain amounts, jointly and severally with the remaining defendants;

2.2

The Super Dealer Agreement ("SDA"), which is central to all claims and disputes, was concluded between MLT and APS, a company registered and having its principal place of business within the area of jurisdiction of this court. Telkom, although not a party, was integral to the conclusion of the SDA by MLT, its subsidiary at the time, which relied upon it for the investment and loan capital required to conduct its business in Nigeria;

2.3

The factual events on which Telkom relies for the relief claimed occurred either exclusively or substantially within the area of jurisdiction of this court and involved all of the defendants, save that APSN was not involved in the conclusion of the SDA;

2.4

Although certain of these events occured in Nigeria, no Nigerian court has jurisdiction over the remaining defendants;

2.5

Telkom's claims against APSN sounding in money are made jointly and severally against the remaining defendants and if successful, are likely to be satisfied only in small part by APSN which lacks the means to satisfy such claims in full, and are likely to be satisfied substantially by the defendants residing and being in the area of this court's jurisdiction;

2.6

Disputes arising from the SDA between the parties thereto (being MLT and APSN) are subject to arbitration within the area of jurisdiction of this court and in accordance with South African law;

2.7

All or most of the natural persons who were involved in the facts relating to the matters arising are resident within the jurisdiction of this court;

2.8

APSN is an essential party to the disputes between Telkom and the remaining defendants by virtue of the material interest that APSN has in the outcome of such disputes;

2.9

APSN's attorneys in the arbitration proceedings have consented to service of any process on behalf of APSN;

2.10

It is alleged that this court has therefore jurisdiction over the matters arising herein, alternatively and in any event, this court is the forum of convenience in relation to the parties, the causes referred to in the particulars of claim and the applicable law, being South African law.

3.

As far as MLT's claims against APSN are concerned, claim A is a claim for damages, jointly and severally with the remaining defendants, and claim B is for an order that the arbitration proceedings will cease to have effect with reference to the disputed questions of MLT's entitlement to avoid the SDA, MLT's entitlement to avoid the cession of the SDA to APSN and MLT's claim for repayment of amounts paid in terms of the SDA as well as an order that the SDA and the cession thereof are void *ab initio,* and that MLT was entitled to avoid the SDA and cession with effect from 25 November 2000. There are also two claims sounding in money, to the extent that those amounts are not recovered under claim A. The other allegations made are those made also in respect of Telkom's claim.

4.

The Super-Dealer Agreement ("SDA") was concluded by APS and MLT on 1 December 2008. Telkom was not a party to this agreement. APSN was formed in 2009 in order to take assignment of APS' rights and obligations under the SDA. It did so with effect from 1 June 2009. Clause 32 of the SDA provided for this, and its purpose was to permit APS to assign its rights and obligations in terms of the agreement to a Nigerian subsidiary or associate in order to comply with Nigerian law. The SDA was implemented in Nigeria. On 25 November 2010, MLT purported to cancel this agreement for APSN's breach thereof. APSN contends that this purported cancellation constituted a repudiation of the SDA, which it accepted and accordingly cancelled the agreement.

5.

In terms of the provisions of clause 22 of the SDA, APSN instituted a claim for some $457 million on 11 June 2011 against MLT by way of vitiation proceedings under the auspices of AFSA. Shortly before the initial hearing MLT introduced a special plea alleging that it was entitled to avoid the SDA as it had been induced by misrepresentation on the part of Blue Label and APS, and because it was tainted by illegality pursuant to conduct in contravention of the Prevention and Commenting of Corruption Act 12 of 2004. As a result the hearing was postponed and is now rescheduled to be heard for three months as from February 2014. On introducing the special plea, MLT contended that the arbitrators did not have the jurisdiction to determine it. This jurisdictional challenge was resolved by MLT and APSN concluding a deed of submission to arbitration which expanded the arbitration agreement to allow the arbitrators to determine the validity of the SDA and their own jurisdiction. The expansion agreement specifically provides in clause 2.4 that APSN and MLT submitted themselves to the jurisdiction of the arbitrators to determine all matters arising out of or incidental to the issues on the pleadings and in the amendment to the pleadings, including the issues arising out of the special plea. The purpose of the expansion agreement was to accommodate MLT's special plea, which was based on substantially the same allegations as those upon which the action is now based. No evidence has as yet been led in these arbitration proceedings.

6.

On 16 May 2013 Telkom and MLT obtained an *ex parte* order for the attachment of APSN's claim and the costs order made in APSN's favour by way of an arbitrator's award dated 14 November 2012 to found and confirm this court's jurisdiction over APSN. As MLT is a Nigerian-based entity, APSN's claim and the order for costs are situated in Nigeria and can only be attached in Nigeria. Telkom and MLT later conceded that the attachment was a nullity, and the *ex parte* order was set aside by agreement between Telkom, MLT and APSN. There is thus no attachment of any asset belonging to APSN to found or confirm this court's jurisdiction over it. The attachment application however remains relevant to costs and I will deal with that hereunder.

7.

The action that I have referred to is founded in delict and is based on allegations pertaining to the defendants' alleged fraudulent or negligent non-disclosure of certain facts, and the breach of certain fiduciary duties by the sixth defendant which caused a wrongful interference with the contractual relationships of Telkom and MLT. Telkom and MLT allege that they have suffered substantial damages inasmuch as if the delicts had not occurred, MLT would not have entered the SDA, or consented to the cession, would not have made any payments to APSN under the SDA and Telkom would have exited the Nigerian market on 1 December 2008, and would not have made any further loans to MLT. MLT also advances a cause of action against APSN (but not the other defendants) based upon the allegation that the Blue Label defendant paid a bribe to the fifth and third defendants under certain circumstances.

As I said, MLT then also claims an order that the arbitration agreement between APSN and MLT shall cease to have effect in terms of the provisions of section 2 of the Arbitration Act in respect of the question whether MLT was entitled to avoid the SDA. This action is based in the main on the conduct of the mentioned defendants other than APSN in the run-up to the conclusion of the SDA on 1 December 2008 as APSN was only formed and took over APS' rights and obligations the following year. The third defendant lodged an application which I heard on the same day, in terms of which it sought an order that this court did not have jurisdiction over it in the said action.

8.

The question of jurisdiction is therefore central to both applications and before dealing with the arguments of the applicant in the section 3(2) application it is convenient to briefly state what APSN has to say in this context. It is common cause that both MLT and APSN are Nigerian-based entities and are *peregrini* of South Africa. Telkom is an *incola* of this court. There has been no attachment of APSN's assets to found or confirm the court's jurisdiction. In the absence of submission, both Telkom (an *incola*) and MLT (a foreign *peregrinus*) require, as a general rule such an attachment to found or confirm this court's jurisdiction regardless of any connection between the cause and the territorial jurisdiction of this court. In this context reliance was placed on the *dictum* by Harms JA in ***Tsung v Industrial Development Corporation of South Africa Ltd* 2006 (4) SA 177 (SCA)** at paragraph 3:

> "If the defendant is a *peregrinus* and whether or not the court has jurisdiction over the cause, eg because the cause of action arose within the jurisdiction or jurisdiction exists *ratione delictus* or *ratione contractus,* an attachment or arrest is essential for the exercise of jurisdiction: A recognised *ratio jurisdictionis* by itself will not do."

The ***Tsung*** case involved a claim by *incola* against two foreign *perigrini.*

9.

MLT and Telkom's argument:

APSN contended that this court has no jurisdiction over it in respect of the substantive relief claimed against it in the action. On that basis, it also challenges the jurisdiction of this court to determine the section 3(2) application. The applicants in turn say that their jurisdiction question is ultimately one for the trial court itself, and that no more than a *prima facie* case of the applicant's version needs to be established for this court to exercise jurisdiction in the application proceedings. I may add at this stage that APSN's counsel Mr. A. Bham SC did not during argument say that MLT's case is wholly unfounded.

Section 3(2) of the Arbitration Act reads as follows:

> "The court may at any time on the application of any party to an arbitration agreement, on good cause shown –
>
> (a) set aside the arbitration agreement; or
>
> (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
>
> (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."

In the context of this "good cause" argument applicant says that this avoidance question will be decided by the High Court in pending proceedings where all interested parties have been joined (if this application is allowed), as opposed to the continuation of parallel arbitration proceedings (and the High Court action in relation to all parties except APSN) in relation to the avoidance question, if relief is not granted in terms of section 3(2). The "jurisdiction question" and the "good cause question" had to be answered in the affirmative they say for the following main reasons:

9.1

This court has jurisdiction to determine disputes and grant substantive relief against foreign defendants in the absence of an attachment to found or confirm jurisdiction, where there is sufficient connection between the matters arising (as contemplated in section 19(1) of the Supreme Court Act 59 of 1959) and the area of jurisdiction of the court, and/or on the basis that this court is the forum of appropriateness and convenience in relation to the matters arising in the proposed proceedings;

9.2

In any event, even if this court were to decline to exercise jurisdiction over APSN in relation to the substantive relief sought against it in the High Court action, APSN is a necessary party to that litigation because it is common cause that this court has jurisdiction in the action over the defendant APS, which concluded the SDA and ceded or purported to cede the SDA to APSN with the consent of Multi-Links. It is an issue both in the arbitration and the action as to whether the conclusion of the SDA and/or the procurement of Multi-Links' consent to cession thereof in favour of APSN were induced by misrepresentation. This court's determination of that issue as between Multi-Links (as plaintiff) and APS (as defendant) in the action is directly relevant to the very same issues which are in dispute in the arbitration proceedings between Multi-Links and APSN;

9.3

In any event, Telkom and Multi-Links pleaded several facts in the particulars of claim (which facts I have set out) which, if proved at the trial, will tend to establish that APSN intended to submit to the jurisdiction of the South African courts before Telkom and Multi-Links raised the spectrum of the action in correspondence with APSN's attorneys.

10.

Jurisdictional connecting factors and the ***Strang*** principle:

***(Bid Industrial Holdings (Pty) Ltd v Strang* 2008 (3) SA 355 (SCA))**

Section 19 (1) (a) of the Supreme Court Act provides that the court:

> "shall have jurisdiction over all persons residing or being in and in relation to all causes arising ... within its area of jurisdiction and all other matters of which it may according to law take cognisance ..."

(I must add that since this hearing, the Supreme Court Act of 1959 has been repealed by the Superior Courts Act 10 of 2013 which for most parts came into operation on 23 August 2013 per Government Gazette 36774. Section 21 (1), in the present context, now reads "A Division has jurisdiction over all persons residing in, or living in, and in relation to all causes arising ... within its area of jurisdiction ... ")

Applicants' counsel Mr. C. Badenhorst SC argued that APSN's contention that this court lacks jurisdiction over it rests on the flawed premise that only attachment to found and/or confirm jurisdiction is sufficient to vest this court with jurisdiction over it. He submitted that our law has moved forward from this historical position, and relied in the main on the "***Strang*** principle". In ***Strang*** the appellant was a South African company and the two respondents were citizens of Australia, resident and domiciled there. They opposed the application on two grounds, the first one being that no *prima facie* case on the merits of the proposed claim had been made out, and the second one being that other nationals while in South Africa enjoyed the protection of the Constitution, and that their arrest to found or confirm jurisdiction would be contrary to various provisions of the Bill of Rights. Section 19(1)(c) of the Supreme Court Act, that empowered such arrest, was therefore unconstitutional. Further, because the legislation derived from a common-law rule, the common law had to be developed so as to abolish the rule. It is not necessary to deal with the merits of the appellant's claim in that case, but it is important to note that Howie P said that the reach of the constitutional issue extended to the many other cases involving the resident plaintiffs suing foreign defendants. It was therefore necessary to decide the constitutional point as a matter of principle and practice, and not just for purposes of the litigation before him. The court then considered the constitutionality of jurisdictional arrest with an aim at founding or merely confirming jurisdiction. For the respondents it was argued that insofar as the common law required an arrest to found or confirm jurisdiction and the statute enabled it, the common law had to be developed by doing away with the requirement, and the statute had to be declared invalid insofar as it enabled the requirement's fulfilment. Such an arrest infringed a range of constitutionally entrenched rights (the right to equality before the law, the guarantee against unfair discrimination, the right to human dignity, the right to freedom of movement and the right to a fair civil trial), and neither the common law rule nor the statute could be saved by a limitations enquiry in terms of section 36 of the Constitution. In that context the learned President of the court said that essentially a court has jurisdiction over a matter if it has the power not only of taking cognisance of the suit but also of giving effect to its judgment. However, it is necessary at the start of the discussion to recognise that the issue here is whether the jurisdictional arrest is constitutional or not. The court was not concerned with the question of jurisdictional effectiveness as such. Were the focus on attachment, not arrest, it would be concerned squarely with effectiveness. Dealing as they were with arrest, effectiveness - and taking cognisance of the suit – enters the picture only insofar as it was concerned to assess whether the jurisdictional arrest serves, or can possibly serve, any constitutional permissible purpose in either respect.

11.

It is clear that the Supreme Court of Appeal then dealt with the common law relating to attachment of property and arrest of a person. The question of attachment was not of any further relevance in those proceedings, and the court in fact dealt with the question whether the arrest aspect infringed the entrenched right to freedom and security of the person. It held that a jurisdictional arrest would cause extensive infringement of various of the defendants' fundamental constitutional rights. I have mentioned them. It held that the infringement was profound. In the context of the limitation requirements of section 36 of the Constitution, it held that it would not be reasonable and justifiable, in our constitutional society to achieve the purpose for the arrest by subjecting foreign defendants to such arrest and detention. There would be less restrictive means to establish jurisdiction, and of course attachment of property was one of them. Section 173 of the Constitution empowered the court to develop the common law, and section 39(2) required it, when interpreting section 19(1) of the Supreme Court Act and developing the common law, to promote the objects of the Bill of Rights. It held that the consideration of a substitute practice can usefully start with the observation that the court had accepted, for purposes of reciprocal enforcement of a foreign judgment, that the defendant's mere physical presence within the foreign jurisdiction when the action was instituted, is sufficient according to South African conflict of law rules for a finding that the foreign court has jurisdiction. It could also be noted that in England, for example, service on a foreign defendant while physically present – albeit temporarily – within its borders is sufficient for jurisdiction, provided the case has a connection with that country. Those were pointers to the acceptability – subject to the presence of sufficient evidential links – of mere physical presence as being an acceptably workable substitute for detained presence. In the context of section 19(1)(a) of the Supreme Court Act Howie P said that jurisdiction would fall within its terms if the matter could be said to involve a "cause arising" or be a matter of which the court "may according to law may take cognisance". A "cause arising" is not to be confused with a cause of action, and to determine what a "cause arising" is, is also to determine of what court may take cognisance, if one is driven back to the common law jurisdictional principles. If those principles can be developed to accommodate a situation like the present, there would be conformity with section 19(1)(a). In the context of the relevant jurisdictional principles it said (paragraph 25) that if the plaintiff decides in favour of suing in South Africa it would be open to the defendant to contest, amongst other things, whether the South African court is the forum of convenience, and whether there are sufficient links between the suit and this country to render litigation appropriate here, rather than in the court of the defendant's domicile. It was also mentioned that it would also suffice to empower the court to take cognisance of the suit if the defendant was served with the summons while in South Africa and, in addition, there was an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of appropriateness and convenience of its being decided by that court. Appropriateness and convenience are lists of concepts which can be developed case by case. Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction (par 56). It is for those reasons, amongst a number of others, that the court held that the common-law rule that arrests are mandatory to found or confirm jurisdiction could not pass the limitations test set by section 36(1) of the Constitution. The common law was therefore developed by the abolition of the arrest rule, and by the adoption in its stead, where attachment was not possible, of the practice according to which a South African High Court would have jurisdiction if the summons is served in the defendant while in South Africa, and there was sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposing of the case by that court was appropriate and convenient. It went without saying that the new practice could itself be subject to development with time.

12.

On the application on the ***Strang*** case, it was submitted that this court has jurisdiction over APSN in the action, and therefore in the application on the grounds set out in the particulars of claim, which I have mentioned. It was appropriate and convenient for this court to exercise such jurisdiction.

13.

In ***Zokufa v Compuscan (Credit Bureau)* 2011 (1) SA 272 (EC)** the respondent company was an *incola* of South Africa but a *peregrinus* of the Eastern Cape High Court. The applicant applied for certain credit records, and the respondent raised the lack of jurisdiction of the Eastern Cape Division, as it was resident within the Eastern Cape. Alkema J dealt with the history underlying the provisions of section 19(1) of the Supreme Court Act which is also reflected in ***Estate Agents Board v Lek* 1979 (3) SA 1048 (A)** at 1059C – 1060A and emphasised that the expression "causes arising" was interpreted not as "causes of action" but as "legal proceedings duly arising" within its area of jurisdiction. The expression "all causes arising" bore a similar meaning in ***s. 19 (1) of the Supreme Court Act***.

See ***Bisonboard Limited v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A)** at 486D-E where Hoexter JA said in relation to section 19(1):

> "In a long line of cases, the words 'causes arising' have been interpreted as signifying not 'causes of action arising' but 'legal proceedings duly arising' that is to say, proceedings in which the court has jurisdiction under the common law."

In ***Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk* 1963 (2) SA 10 (T)** Trollip J (as he then was) after considering the cases on the subject, came to the conclusion that "causes arising within its jurisdiction" in section 19(1) meant an action or legal proceedings which, according to the law, had duly originated within the court's area of jurisdiction. That was still the law today. See ***Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA)** at paragraph 11, where it was said that "causes arising" refers to all factors giving rise to jurisdiction under the common law. The question therefore was whether the legal proceedings in the application could be said to have arisen within the jurisdiction of this court. The legal proceedings were based on facts from which legal inferences could be drawn. These are often referred to as "jurisdictional connecting factors" and this enquiry depends on the nature of the proceedings, the nature of the relief claimed therein and in some cases on both. In the context of interdict proceedings, the court then held, (in ***Zokufa***) after analysing various authorities, if the requirements for the grant of an interdict was satisfied by facts within the territorial jurisdiction of the High Court, the High Court would possess jurisdiction to decide the matter. It made reference to the doctrine of effectiveness but referred to the criticism of **Harms *Civil Procedure in the Superior Courts*** at A-17 and stated that this doctrine had in fact been eroded by the ***Strang*** decision. On the basis of that decision, it assumed jurisdiction, and it seems that this was ultimately done for the reasons that there was a sufficient connection between the suit and the area of jurisdiction of the court concerned, so that disposal of the case for that court was appropriate and convenient.

14.

It is true, of course, as Mr. Bham SC pointed out, that the ***Strang*** decision concerns the constitutionality or otherwise of an arrest of a *peregrinus* individual to found jurisdiction. It did not concern a corporate entity, and it was on that basis that Mr. Bham SC argued the ***Strang*** principle was of no application herein. Corporations are obviously not amenable to arrest. The right to security of the person in terms of section 12(1) of the Constitution was a right which could only vest in natural persons, he submitted. This is true, but Mr. C. Badenhorst SC in turn was of the view that the ***Strang*** case laid down a general principle and that it would be absurd if one were to make a distinction between natural persons and corporate entities in this context.

15.

The ***Strang*** decision dealt with the constitutionality or otherwise of an arrest of an individual to found jurisdiction where attachment had not occurred, and wherein the court found, in developing the common law, that considerations of appropriateness and convenience could be sufficient in appropriate circumstances, and that the doctrine of effectiveness was no longer pre-eminent in questions relating to jurisdiction over foreign defendants. In that context Howie P has said that the responsibility for achieving effectiveness, absent attachment, was essentially that of the parties and more especially the plaintiff, and that if the plaintiff decided in favour of suing in South Africa it would be open to the defendant to contest, among other things, whether the South African court is the *forum conveniens* and whether there were sufficient links between the suit and this country to render litigation appropriate here, rather than in the court of the defendant's domicile. As I said, the court was ultimately of the view that it would suffice to empower the court to take cognisance of the suit if the defendant was served with the summons while in South Africa and, in addition, there was an adequate connection between the suit and the area of jurisdiction of the South African court from the point of view of appropriateness and convenience. The question therefore is whether all of those comments were confined to the case where the respondent was a natural person? If the reasoning behind the ***Strang*** decision, although it dealt with arrest of an individual, and the *dicta* relating to appropriateness and convenience apply in general, where there has been no attachment, it would seem that the following facts support the applicant's case that this court ought to assume jurisdiction on the basis of appropriateness and convenience: APSN concluded the SDA as an *incola* of this court's area of jurisdiction. It agreed to the arbitration clause which meant that the arbitration would be in South Africa, in accordance with the South African Arbitration Act, in accordance with the Commercial Arbitration Rules of AFSA, it nominated a *domicilium citandi et executandi* within the area of this court's jurisdiction, which *domicilium* address was not changed after the cession of the SDA to APSN, it agreed that South African law would govern the SDA and any dispute pursuing thereto, APSN as cessionary of APS assumed the same rights and obligations as APS in terms of the SDA, APSN invoked the arbitration clause without qualification, it extended the terms of reference of the arbitration to include determination of the special plea, its principal agent in relation to the conduct complained of is the fourth defendant who is domiciled in, and ordinarily resident within the area of jurisdiction of this court and is a co-defendant with APSN in the action, APSN was at all material times controlled by Blue Label and APS, of which it is a subsidiary and both Blue

Label and APS are domiciled within the court's jurisdiction and the factual events on which Telkom and Multi-Links rely for the relief claimed in the action occurred within this court's jurisdiction and involved all of the defendants in the action, with the exception that APSN was not involved in the conclusion of the SDA. APSN was formed after the conclusion of the SDA in April 2009 but this is not important, inasmuch as these negotiations were expressly conducted on its behalf as a company "to be formed". Defendants are furthermore sued jointly and severally, and any judgment in favour of Telkom and Multi-Links would be capable of effective execution in South Africa. It was therefore the applicants' submission that these jurisdictional connecting factors support the conclusion that the court was, a matter of law, likely to "take cognisance" of the action. Once this was so, this court had jurisdiction to determine whether relief ought to be granted in terms of section 3(2) of the Arbitration Act.

16.

In ***Fleet Africa (Pty) Ltd v Cargill Cotton Genus Limited*** **[2010] JOL 26331 (GSJ)** the plaintiff claimed an amount from the defendant arising from transport and other logistical services rendered in collecting raw cotton from depots in Zambia and delivering it to a ginnery in Zambia for processing. The defendant was a company registered in Zambia with its registered office in Zambia. The plaintiff's registered office was in Pretoria while its principal place of business was in Pine Town, Kwa-Zulu Natal. The alleged agreement was concluded in Kwa-Zulu Natal and the breach of the agreement, if such had occurred, would have been in Zambia. It is also argued that the defendant did not reside in, and was not, in the area of jurisdiction of the court within the meaning of section 19(1) of the Supreme Court Act. It was held that while the defendant was an international company, its African operations were at all material times, centrally controlled and managed from South Africa. The defendant had a substantial place of business at Fourways in Johannesburg, and therefore "resided" within the area of jurisdiction of the court. The learned Judge dealt with a number of relevant authorities and referred to ***Appleby (Pty) Ltd v Dundas Ltd*** **1948 (2) SA 905 (E)** where commercial convenience was stressed when interpreting section 5 of the Administration of

Justice Act 27 of 2012, the predecessor of section 19 of Supreme Court Act. The ***Appleby*** decision was referred to with approval in the case of ***Bisonboard Ltd supra***, and Willis J stated that he agreed with the view of Kuny AJ in ***Tsichlas and Another v Touchline Media (Pty) Ltd* 2004 (2) SA 112 (W)** at 119H that when it came to jurisdiction, the test was really whether the defendant had a sufficient "presence" to justify the court having jurisdiction. Willis J was of the view that the ***Strang*** decision had adopted a similar view, and said that it seemed clear to him that the Supreme Court of Appeal has, since that decision, adopted a more relaxed view as to jurisdiction and that considerations of appropriateness and convenience had to prevail. He did not regard that decision as being distinguishable as much as the facts before him related to two corporate entities. It is clear from the ***Zokufa*** decision ***supra*** that the ***Strang*** principle was also applied to a *peregrinus* defendant company.

17.

I was also referred to the decision of the House of Lords in ***Spiliada Maritime Corporation v Cansulex Ltd* [1986] 3 All ER 843 (HL)** where the following was said at 853 – 854, that it is doubtful:

> "... whether the Latin tag *'forum non conveniens'* is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However, the Latin tag (sometimes expressed as *forum non conveniens* and sometimes as *forum conveniens*) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of 'mere practical convenience'. Such a suggestion was emphatically rejected by Lord Kinnear in ***Sim v Robinow* (1892) 19 R (Ct of Sess) 665** at 668 and by Lord Dunedin, Lord Shaw and Lord Sumner in the ***Société du Gaz* case 1926 SC (HL) 13** at 18, 19, and 22 respectively. Lord Dunedin said, with reference to the expressions *forum non competens* and *forum non conveniens:*

> 'In my view, "competent" is just as bad a translation for *"competens"* as "convenient" is for *"conveniens"*. The proper translation for these Latin words, so far as this plea is concerned, is "appropriate".'

Lord Sumner referred to a phrase used by Lord Cowan in ***Clements v Macaulay*** **(1866) 4 Macph (Ct of Sess) 583** at 594, *viz* 'more convenient and preferable for securing the ends of justice', and said:

> '... one cannot think of convenience apart from the convenience of the pursuer or the defender or the Court, and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as "more convenient, that is to say, preferable, for securing the ends of justice," I think the true meaning of the doctrine is arrived at. The object, under the words *"forum non conveniens"* is to find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends.'

In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word 'convenience' and to refer rather, as Lord Dunedin did, to the appropriate forum".

18.

The ***Spiliada*** case concerned an action brought by ship owners in England for compensation for damage to a Liberian owned vessel carrying on business in British Columbia. The ship owners obtained leave *ex parte* to institute proceedings against the shippers in England on the ground that the action concerned the recovery of damages for the breach of a contract governed by English law. In response, the shippers asked that the *ex parte* order be discharged on the ground, *inter alia*, that the case had not been shown to be a proper one for service out of the jurisdiction. Lord Goff set out six principles for the test of *forum (non) conveniens* adopted in England. **Forsyth, *Private International Law* 5 ed 2012** summarised these principles at 187-188 as follows:

"36.1 The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the Action, ie in which the case may be tried more suitable, for the interests of all the parties and the ends of justice ...

36.2 (I)n general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay ... if the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the Action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country ...

36.3 The question being whether there is some other forum which is the appropriate forum for the trial of the Action, it is pertinent to ask whether the fact that the plaintiff has, *ex hypothesi*, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established.

36.4 Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the Action, the court will look first to see what factors there are which point in the direction of another forum ... I respectfully consider that it may be more desirable, ... to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in ***The Abdin Daver*** **[1984] A.C. 298, 415**, when he referred to the 'natural forum' as being 'that with which the Action had the most real and substantial connection'. So it is for connecting factors in this sense that the court must first look, and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction ... and the places where the parties respectively reside or carry on the business.

36.5 If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the Action, it will ordinarily refuse a stay ...

36.6 If however the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the Action it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact that if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction ... [In this case] the burden of proof shifts to the plaintiff".

19.

The doctrine of *forum conveniens* is not foreign to our law and in this context Mr. C. Badenhorst SC referred me to section 7 of the Admiralty Jurisdiction Regulation Act 105 of 1983 which provides that a court "may decline to exercise its admiralty jurisdiction in any proceedings instituted that is of the opinion that the action can more appropriately be adjudicated upon by another court in the Republic or by any other court, tribunal or body elsewhere". In ***Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris*** **1989 (3) SA 820 (A)** the Appellate Division impliedly accepted the doctrine into our law within the circumscribed context of admiralty cases. A more recent example is ***Great River Shipping Inc. v Sunnyface Marine Ltd*** **1992 (4) SA 313 (C)**, where the court called section 7 of the Admiralty Jurisdiction Regulation Act "the *forum non conveniens* principle expressed in statutory form." It was submitted that the ***Spiliada*** decision had an important effect in jurisdictions other than in South Africa such as New Zeeland, Canada, Hong Kong, Singapore and Ireland. Though it was not followed in Australia, the principle has since been established by the fact that the stay may be granted where the forum is clearly an inappropriate one for the trial, where the formulation of the test required to meet the threshold being loaded in favour of trial in the forum. The position under English law was therefore authoritative support for the contention that this court has jurisdiction by operation of the *forum conveniens* doctrine. This same doctrine has been in operation in the United States. See **Cheshire, North and Fawcett, *Private International Law,* 14 ed 2008** at 426.

20.

It was also submitted that there was an additional basis on which this court has jurisdiction over APSN, even if APSN is not subject to the court's jurisdiction for purposes of the substantive relief sought in the action. APSN is a necessary party to those proceedings, since it is common cause that this court has jurisdiction in the action over the defendant APS, which concluded the SDA, and ceded or purported to cede the SDA to APSN with the consent of Multi-Links. It is in issue both in the arbitration and in the action as to whether the conclusion of the SDA and/or the procurement of Multi-Links' consent to cession thereof by APS in favour of APSN were induced by misrepresentation. The court's determination of that issue as between Multi-Links as plaintiff, and APS as defendant, manifestly determines the same issue which is in dispute in the arbitration proceedings between Multi-Links and APSN. Consequently, the issue as raised in the special plea filed in the arbitration not only overlap but are virtually identical to the main and central issue in the action. Multi-Links relies on this fact as a self-standing basis for jurisdiction in its particulars of claim and also raised the contention in its answering affidavit to the Rule 6(11) application. It was submitted that APSN does have a direct and substantial interest in the subject matter of the action in the form of its legal interest which may be prejudicially effected by the judgment of the court. This is particularly so because APSN derive title in the SDA from APS. It cannot have greater rights than its cedent APS, and this question is manifestly one which has to be adjudicated not only as between Multi-Links and APS, but simultaneously, and in the same forum, as between those parties and APSN as well. Joinder of all concerned is only possible in the action. Since this court's determination of the avoidance question between Multi-Links as plaintiff and APS as defendant has central relevance to the same issues in the arbitration, it is beyond debate that APSN has a direct and substantial interest in the action. In any event, it was submitted, that the possibility of such an interest is sufficient, and it is not necessary for me to determine that it in fact exists.

See ***Abrahamse v Cape Town City Council* 1953 (3) SA 855 (C)** at 859.

21.

The ***Continentia causae*** rule and APSN's implied 'submission".

It was also submitted on behalf of the applicant in the stay proceedings that this court also has jurisdiction by operation of the ***continentia causae*** rule and APSN's implied submission. This is the common law doctrine of cohesion of a cause of action, and is applicable where a court has jurisdiction over a part of a cause of action and considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause.

See ***Permanent Secretary, Department of Welfare, Eastern Cape, v Ngxuza and Others* 2001 (4) SA 1184 (SCA)** at paragraph 22.

In ***Roberts Construction Company Ltd v Wilcox Brothers (Pty) Ltd* 1962 (4) SA 326 (A)** the court was held to have jurisdiction on the *causae continentia* rule. The rationale for this principle is the avoidance of an unnecessary multiplicity of actions and duplication of proceedings concerning the same subject matter which may cause inconvenience and result in contradictory judgments. This decision was applied and extended by the SCA in the mentioned ***Ngxuza*** decision where Cameron AJ held at paragraph 22 that that court had in the past not been averse to developing the doctrines and principles of jurisdiction so as to ensure rational and equitable rules. Where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justifies it's exercising jurisdiction over the whole cause. In the present case it is common cause that no other court has jurisdiction over all the defendants. The *causae* upon which Telkom's and Multi-Links' cases are founded largely occurred in this court's area of jurisdiction involved parties that are resident therein, and the facts giving rise to the action are intertwined. Mr. Badenhorst SC however also submitted that it was inappropriate for the question of jurisdiction to be finally determined at this early stage of the proceedings as APSN requests in terms of its so-called Rule 6(11) application. It is a privotable issue which should be if required be dealt with by the trial court, with regard to the full facts, in due course. With reference to the relevant *dicta* in ***Hay Management Consultants v P3 Management Consultants* 2005 (2) SA 522 (SCA)** it was submitted that APSN had by its conduct already consented to the jurisdiction of this court, that it had intended do so, and that the trial court may in due course arrive at such conclusion. In that case the following facts were considered by the trial court whose judgment was upheld on appeal to the SCA, namely that the defendant, an English company with no past or present connection with South Africa, chose as its domicile in terms of the relevant agreement a South African address, that the on-going business relationship was to be conducted in a number of different African jurisdictions with different legal systems where English law was an obvious option, the selection of South African law was regarded by the court as a factor which informed the question of the intention to establish a connection with the South African court. See ***Hay Management* decision** (SCA) paragraphs 14-15. Similarly, in the action, Telkom and Multi-Links pleaded several facts, which, if proven at the trial, would tend to establish that APSN intended to submit to the jurisdiction of the South African courts. Also relevant to the jurisdiction enquiry is that under clause 27 of the SDA, APS, and accordingly also its cessionary APSN, chose domicile at Blue Label South African's address. It was however submitted that these facts could not appropriately be ventilated and evaluated at this stage of the proceedings.

22.

Respondents' argument (applicant in the Rule 6(11) application

I have already mentioned, that it was submitted by Mr. Bham SC that the ***Strang*** principle finds no application herein. There was also no question of APSN submitting to this court's jurisdiction and it was a question of fact whether it did so or not. I agree with that contention (the last part). I have set out the relevant facts most of which are contained in the particulars of claim. They could not be construed as indications that APSN intended to submit to the jurisdiction of any court.

Convenience was also not an independent ground upon which I could assume jurisdiction over APSN, where this court did not otherwise have such jurisdiction on one of the other recognised grounds. Convenience in the *causae continentia* principle operates only within the context of the *rationis jurisdictionis*. These principles are applicable only where the defendant over whom the court is asked to assume jurisdiction is a *peregrinus* of that court but an *incola* of South Africa (i.e. a local *peregrinus*) and the court must determine which division of the High Court within the unitary judicial system in South Africa has jurisdiction. Any connection between the claims advanced by Telkom and MLT against APSN in the action does not vest this court with jurisdiction independently of an attachment of APSN assets or a submission to jurisdiction. Accordingly none of the grounds on which Telkom and MLT rely in the particulars of claim vests this court with jurisdiction over APSN, so it was contended. This court does therefore not have the power to exercise any jurisdiction over APSN, and it can accordingly not be compelled to participate in the action. Accordingly APSN is entitled to an order to this effect in the interlocutory application in terms of Rule 6(11).

23.

My reasoning:

It is true as I have mentioned, that the ***Strang*** decision had its origin in the application for the arrest of a foreign individual who, when present in South Africa, was subject to the human rights provisions of the Constitution. It was on that basis that the Supreme Court of Appeal held that an arrest to found or confirm the jurisdiction, in the absence of an attachment, was not a justifiable infringement of various human rights. In that context the common law was developed so as to not allow for such an arrest and in that light, the provisions of section 19(1) of the Supreme Court Act had to be interpreted in future. In that given context however the court also dealt with the interpretation of the provisions of section 19(1) of the Supreme Court Act and dealt with its interpretation in the context of what is "causes arising"? It is in that context that the question of *forum conveniens* arose and the question of whether there was sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant's domicile.

It is also in that context that the question of appropriateness and convenience arose, questions which had to be dealt with on a factual basis and developed case by case. I therefore do not agree that the ***Strang*** decision is of no application herein. I have referred to a number of decisions that followed and applied the ***Strang*** interpretation, and those did not relate the question of a natural person only. The question of convenience and justice in the context of jurisdiction has also been similarly decided by other jurisdictions, and I have referred to a few of them herein above, and of course especially the ***Spiliada*** decision of the House of Lords. In the context of the interpretation of ***s. 19 (1) of the Supreme Court Act*** , and the meaning of "causes arising" it seems to me that one must determine the forum most suitable for the ends of justice and because pursuit of the litigation in that forum is most likely to secure those ends. The appropriate or natural forum is that with which the action has the most real and substantial connection. In that context then, the Court would look to all the connecting factors including all background facts, convenience, experts, the law governing the relevant transaction or action, the place where the parties reside or carry on business, etc. As far as the *continentia causae* rule is concerned, there are again strong factual indications which would support the argument that the court will assume jurisdiction over APSN in the trial. I have referred to most, if not all facts relevant to the consideration of the stay application and the Rule 6(11) application, which essentially overlap insofar as the question of jurisdiction is concerned. It is my view that Mr. C. Badenhorst SC is correct in submitting that Multi-Links must raise a triable issue and, with regard to the facts, that it has done so. The relevant decisions of the various courts that I have referred to, strongly support his argument. I am however also in agreement with his submission that the question of jurisdiction ought to be finally decided by the trial court. The principles in the SCA decision in ***Hay Management*** give further guidance in this regard but again, this is a question that a trial court will appropriately decide. I agree that I cannot and ought not make a final decision at this stage of the proceedings.

I am however of the view, having regard to all of the above facts and legal principles, that the third defendant is at this stage not entitled to an order that this court does not have jurisdiction over it in the action under case number 30004/2013. **This application is accordingly dismissed with costs including the costs of three counsel.**

24.

The stay application in terms of section 3(2) of the Arbitration Act:

"Good cause" for relief in terms of this section must be shown. I must exercise a judicial discretion in this context. The particular applicant bears the onus of showing that sound compelling reasons exist for such relief.

See ***Universiteit van Stellenbosch v JA Louw (Edms) Bpk*** **1983 (4) SA 321 (A)** at 333H-334B. The study of case law relevant to this topic shows that cases which have succeeded are mainly those where the arbitration forum would not be the appropriate one for resolving the particular dispute at hand. See for instance ***Weli Hockey J and Others v Advtech Ltd and Others*** **2003 (6) SA 737 (W)**, ***Rawstorne and Another v Hodgen and Another*** **2002 (3) SA 433 (W)** and ***Sara v De Wet*** **1974 (2) SA 645 (T)**. In this context Multi-Links' application is based on the following grounds:

24.1

The two primarily interested parties are Telkom and Blue Label;

24.2

They are not parties to the arbitration proceedings, but they are joined in the court action. It would be extremely artificial (and wrong) for the key players to be excluded from the process where the avoidance question is determined. One way or the other, the answer to this question would have far-reaching consequences for Telkom and Blue Label. Even APS (the original SDA contracting party and cedent) is not a party to the arbitration process but it is joined in the action;

24.3

The fact that APSN (which is the only defendant in the action susceptible to the arbitration proceedings) is the cessionary of APS' rights to the SDA is a telling fact in support of section 3(2) relief;

24.4

Blue Label and APS negotiated the SDA and they (and their officials together with the sixth defendant) stand accused of untoward conduct and are thus pursued in the action for damages suffered by Telkom and Multi-Links;

24.5

A damages claim against APSN alone (in the arbitration) is futile, since it was admittedly a "man of straw" in the context of the amounts in issue. Only Blue Label, the JSE listed company, would be in any financial position to pay significant damages to Telkom and Multi-Links;

24.6

The question of avoidance and all the facts giving rise to it are the key issues in the action (this will remain so whether the APSN is joined or not);

24.7

Determination of the avoidance question *vis-à-vis* APS (in the action) will necessarily destroy all claims based on the SDA brought by APSN in the arbitration if the question is determined in favour of the plaintiffs. This is so because APS is the original party to the contract, whose rights were ceded to APSN;

24.8

APSN, a cessionary, steps into the shoes of the cedent;

24.9

APSN can never be in a better position than APS itself. If the agreement is held to be void by the court in the action, it will *ipso facto* be void not only for APS but also for the cessionary, APSN;

24.10

Avoidance of parallel and duplicated proceedings;

24.11

Saving of substantial costs in the arbitration would not be incurred in the action;

24.12

The substantial damages claimed by Telkom and Multi-Links are raised against the defendants jointly and severally. These claims which turn substantially on the facts relevant to the avoidance question, cannot be brought in the arbitration against all the defendants who are being held liable;

24.13

As I have said, it is undisputed that APSN is a "man of straw" relative to the significant amounts claimed in the action. It follows that Multi-Links cannot effectively bring its damages claim (amounting to approximately $196 million) against APSN alone in the arbitration proceedings. It would be futile and a waste of resources to pursue the claim against APSN alone in the arbitration;

24.14

There is a significant risk of competing decisions if duplicate or multiple proceedings are allowed to continue;

24.15

Telkom is listed as a "major public entity" in terms of Schedule 2 to the Public Finance Management Act 1 of 1999 and is a state owned company in terms of section 8 of the Companies Act of 2008. There is accordingly a significant public interest at stake. Telkom and Multi-Links are claiming repayment of enormous amounts of public funds which are alleged to have been lost owing to "shady business dealings" involving a public listed company and its senior officials;

24.16

The avoidance question also concerns the provisions of section 217 of the Constitution;

24.17

The parties against whom the accusations of untoward conduct are made are primarily Blue Label, APS, Pamensky, Ndwaba and Msimango who are already joined as defendants in the action. It follows that the approach and some of the section 3(2) cases in terms of which the election to proceed in court (as opposed to arbitration) is given to the accused party, as opposed to the accuser, does not apply on the present facts. The accused parties cannot "prefer arbitration" above pending court process as a forum in which to have the accusations against them tried. At the time when the alleged shady deals were struck (the second half of 2008) APSN was not incorporated.

25.

The respondent's argument

It was submitted that APSN is not subject to the court's jurisdiction in the action. One party to the arbitration would therefore never be a party to the action. There could therefore never be any multiplicity of proceedings involving MLT and APSN or any risk of competing decisions in different proceedings involving MLT and APSN. This undermined the fundamental basis of the stay application, so it was contended.

26.

Although it was said in the affidavits that MTL's case was "wholly unfounded", this argument was not raised before me by Mr. Bham SC and in any event it is clear that numerous complex questions of fact and law will be raised in a trial.

27.

As I have said in the context of the Rule 6(11) application, the relevant facts and the case law dealing with extended jurisdiction in terms of the provisions of section 19(1) of the Supreme Court Act properly interpreted, a strong *prima facie* case has been made out that a trial court will indeed find for a number of reasons, that it has jurisdiction over APSN. If the considerations that I have referred to under the heading of Applicant's argument are then also taken into account, I am of the view that I can properly exercise my discretion in favour of Multi-Links in this particular context.

28.

Accordingly I grant an order in terms of prayers 1 and 3 of the notice of motion under case 35347/2013, such costs to include the costs of three counsel.

29.

Costs in the attachment application under case number 26827/2013:

Telkom and Multi-Links obtained an *ex parte* order from this court on 16 May 2013 for the attachment of APSN's claim against MLT instituted by way of arbitration proceedings in Johannesburg, and the costs order made in APSN's favour by way of the arbitrator's award dated 14 November 2012. ASPN applied for the reconsideration of the *ex parte* order, *inter alia* on the basis that its claim against MLT and the order for costs were not situated in the jurisdiction of the court, and could therefore not be attached to found or confirm this court's jurisdiction in the action that Telkom and MLT intended to institute against APSN and others. This was because the claim and the order for costs are personal rights against MLT and are situated where MLT resides, which is Nigeria.

See ***MV Snow Delta: Serva Ship Ltd v Discount Damage Ltd* 2000 (4) SA 746 (SCA)**.

Telkom and MLT conceded that as APSN's claim and the order for costs were situated in Nigeria, the *ex parte* order fell to be set aside. They served a notice of abandonment of the *ex parte* order on APSN and tendered its party and party costs up to the date of delivery of this notice on 26 June 2013. APSN did not accept this tender and sought an order that Telkom, MLT and Mr. Biebuyck (*de bonis propriis*) are jointly and severally liable for the costs of the application on the attorney and client scale, alternatively Telkom and MLT are jointly and severally liable for these costs on the attorney and client scale. By agreement between the parties the *ex parte* order was set aside on 1 July 2013. I must add however that the tender of party and party costs up to the date of delivery of the notice of abandonment was made subsequent to the answering affidavit of APSN.

30.

In this context the main contentions of APSN were the following:

30.1

The application was fundamentally misconceived as, contrary to trite authorities which should have been found and disclosed to the court, the assets that Telkom and MLT sought to attach are not situated within the court's jurisdiction;

30.2

Their attorney Mr. Biebuyck ascended into arena by adducing evidence of which he had no direct knowledge;

30.3

He and his clients were guilty of breaching the good faith rule in *ex parte* applications of failing to disclose adverse facts material to the application;

30.4

In the light of the correspondence preceding the attachment application in which APSN expressly requested notice of the application, it was improper for them to have brought the application *ex parte*;

30.5

They thought that APSN had submitted to the court's jurisdiction when they approached the court for the attachment of APSN's assets. As an attachment was not permissible after a submission, it was improper for them to have sought the attachment of APSN's assets.

On behalf of Telkom, Multi-Links and Mr. Biebuyck it was submitted that there was no basis at all for any punitive costs order. As for costs *de bonis propriis,* it was submitted that Mr. Biebuyck was unfairly in the fire line. It was, so it was submitted, not uncommon in interlocutory applications, for the attorney who is conversant with the issues in the proposed action to depose to the affidavit on his client's behalf. Mr. Biebuyck accordingly did not do so whilst on a frolic of his own, or for purposes of becoming personally involved in the dispute, but rather in the service of his clients and in accordance with their instructions. Mr. Biebuyk deposed in the relevant founding affidavit to which extent he had been involved in the preparation for the arbitration proceedings and which facts were to his knowledge, where common cause, or emanated from APSN's discovered documents or versions advanced. It was also submitted that APSN in fact suffered no great inconvenience than to read the *ex parte* application papers, research the *situs* point, and advise the applicants that the attachments was invalid. But for the instance on punitive costs and desire to act *in terrorem* against Mr. Biebuyck, they would have suffered less inconvenience than a litigant who in the normal course is put to the trouble of considering and successfully opposing the legal proceedings. Such inconvenience does not without more attract costs or on a punitive scale. It is clear from the founding affidavit that Mr. Biebuyck dealt with the relevant assets which they sought to be attached, and the status of the parties in some detail. It is also denied that the principle in question, settled as it may be, was "trite" as claimed by APSN's attorney. He himself acknowledged in correspondence that his legal team had "researched" the point. It was however conceded that the applicant's legal team overlooked the point nor did the particular Judge hearing the application raise it. The relevant error made by the applicants in that application was, it was submitted, an error reasonably made in the context of immediate other issues which had to be considered in formulating the claims against the defendants, and the *ex parte* application itself, in which *ratio jurisdictionis* had to be identified and established in the founding papers. The proposition that the *situs* of an incorporeal is determined by settled law is accepted. However, as I have said, the proposition that it is "trite law" is disputed. It is not trite because it is a relatively obscurely legal principle which seldom comes into play, and is thus more easily overlooked than "trite" principles properly so-called which regularly come into play in legal proceedings. There is therefore no basis for a punitive costs order *de bonis propriis*.

32.

I was referred to the correspondence between the particular attorneys but I do not propose dealing with it. It is clear to me that they created an Okovango delta where only a mere waterhole was visible. They imputed the worst possible motives to each other. I mentioned in court during the hearing that I was disappointed when I read the relevant correspondence between the attorneys even before the date for the hearing had been arranged in my capacity as case manager.

33.

It is of course true that full disclosure of every material fact needs to be made in *ex parte* applications but the real question is whether any undisclosed facts related to those which "might influence the court into coming to a decision". They do not relate to all conceivable matters that may be relevant to the subject matter of the *ex parte* application. The usual sanction for non-disclosure of such facts is that the *ex parte* order is set aside, but that is also not even an automatic consequence.

See ***Hassan AJ and Another v Berrange NO* 2012 (6) SA 329 (SCA)** at paragraphs 13 and 14. It must not be forgotten that applications for attachment to found and confirm jurisdiction are properly brought on an *ex parte* basis.

See ***Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA)** at paragraph 7. In this context the plaintiff had, until submission to jurisdiction, the right to apply for such an order and, if the relevant requirements have been met, is entitled to such an order. As a matter of principle the defendant has no interest or right to notice of preliminary steps taken in anticipation of the institution of legal proceedings. A plaintiff is not obliged to inform a defendant of its intention to issue summons. There is no equally no reason why it is bound to give notice of an application for attachment. A defendant's rights are not affected by the *ex parte* nature of the application. The defendant is however entitled to apply to set aside an invalid attachment or seek reconsideration of an attachment order irregularly obtained. I do not intend to deal with other issues emanating from the correspondence that seemed to be on the periphery at best. I have read and considered the argument in the context of that correspondence relating to the role of other defendants and the merits of any claim in the action.

I have referred to the tender that was made up to the date of the delivery of the notice of abandonment. The costs relating to perusal and consideration of the *ex parte* application were included in the tender as well as the costs of the reconsideration application itself on the party and party scale. It was therefore submitted that APSN should have put an end to this aspect of the litigation by accepting the tender. The principle that the court discourages parties from generating substantial costs in order to secure costs, finds application *a fortiore* when the entire exercise now is aimed at securing special costs orders, ordinary costs having been tendered.

34.

Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. It is quite correct, as was submitted, that the obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to a deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner.

See ***Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA)** at 655-656.

35.

It is true that legal representatives sometimes make errors of law, omit to comply fully with the Rules of Court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not however *per se* ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetent and a lack of care.

See for instance **Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa* (5th Edition by Cilliers and Others) Vol 2** at p984.

See also: ***Ward v Sulzer 1973 (3) SA 701 (AD) at 706 – 707.***

36.

It is my view that none of these requirements have been met in the present instance and there is no basis to order that the mentioned attorney pay the costs personally.

37.

I do agree with Mr. A. Bham SC's submission that certain general standards apply in the context of whether or not counsel are obliged to bring an authority which precluded the granting of an order sought to the court's attention. I agree with what

Wunch J said in ***Ex parte Hay Management Consultants (Pty) Ltd* 2000 (3) SA 501 (W)** at 506-507: "Had I not known of it, counsel's ignorance of its existence and failure to bring it to my attention would have misled me. While counsel and attorneys may not be expected to read the law reports as they are published and their contents or effect, if they have to present argument on a matter, the least that is expected of them is to consult the relevant textbooks, the consolidated indexes of a noter-up of the ordinary law reports and the indexes of a noter-up on weekly or monthly reports which had been published after the effective of the latest consolidated index and noter-up. I do not mention their computer services that are available to achieve material."

I could however add that I do expect counsel and attorneys to read the law reports as they are published, as they may have a vital impact on litigation with which they are busy. Counsel should be up to date with recent authorities in their field of practice and authority that relates to the subject matter at hand when they appear in court. Obviously, it happens every day, that counsel's opponent mentions an authority of which he (she) had either not been aware, or had not mentioned during the address or argument. Similarly the court *mero motu* often refers to an authority that was not mentioned by the parties. This does not *per se* mean that one or other counsel was negligent or acted improperly. It also does not mean that they had an improper motive *per se*, or acted vexatiously. Each case would depend on its own merits, and in my view no general rule should be laid down that would have the effect of limiting in any way counsel's duty to act fearlessly but obviously honestly and ethically. As I have said, in the present instance, I do not find that either Mr. Biebuyck or his counsel in the attachment application acted so irresponsibly, that a special costs order would be justified against them personally.

38.

There is however one other aspect which causes me concern. In the correspondence it appears that APSN's attorney specifically required notice of any attachment application and authorised service at his office for this purpose. The attachment application ran to some 219 pages and Mr. Biebuyck attached the relevant correspondence in which APSN requested notice of this application. He even referred to one of the letters in which ASPN consented to service at the offices of its attorneys. But he neglected to say that APSN did so in order to ensure that it would be notified of any application for an attachment. The argument of Telkom and Multi-Links do not deal with this point specifically, but it does have merit. I think it is the wrong approach to analyse each and every criticism of the launching of the attachment application individually, and then deciding whether or not it, by itself, ought to result in a special costs order. In my view an overall balanced view of the whole of the proceedings and the relevant facts, ought to be taken. If a court is then left with that undefinable feeling, which feeling must however be based on rational analysis of the facts and legal principles, that something is "amiss" if I can put it that way, it may justify that by deciding that the opposing party ought not to be out of pocket as a result of the application having been launched. The following *dictum* in ***Nel v Waterberg Landbouers Ko-operatiewe Vereeniging* 1946 AD 597** at 607 is in my view apposite:

> "The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

I have referred to some of the more material and relevant considerations. As I have said, I do not intend to deal in this judgment with the considerations that I regard as being on the periphery of the more material relevant facts. In adopting this overall view of all the material facts I am of the view that APSN ought not to be out of pocket in the context of the attachment application proceedings.

I deem it therefore just that the following order be made:

Telkom SA SOC Limited and Multi-Links Communications Ltd are jointly and severally liable for the costs of the attachment application under case number 26827/13 on the scale of attorney and client, which costs include the costs of three counsel.

H.J. FABRICIUS

JUDGE OF THE HIGH COURT

CASE NO: 35347/13; 30004/13; 26827/13

HEARD ON: 19 August 2013

FOR THE APPLICANT/PLAINTIFF: ADV C. Badenhorst SC; with him,
ADV C.E. Watt-Pringle SC

INSTRUCTED BY: Routledge-Modise Inc. Sandton

FOR THE RESPONDENT/DEFENDANT: ADV A. Bham SC; with him,
ADV S. Miller and ADV C. Steinberg

INSTRUCTED BY: Knowles Husain Lindsay Inc. Sandton

DATE OF JUDGMENT: 6 September 2013