

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 82/2012

In the matter between:-

ACL GROUP (EDMS) BPK 1st Applicant

INTARA TRADING BK 2nd Applicant

ACL/INTARA GESAMENTLIKE ONDERNEMINGS 3rd Applicant

and

QICK TELEVENTURES FZE Respondent

DELIVERED BY: SNELLENBURG, AJ

HEARD: 21 JUNE 2012

DELIVERED: 12 JULY 2012

[1] This is an application in terms of the provisions of section 19 of the Supreme Court Act 59 of 1959 [**‘the Supreme Court Act’**] to confirm jurisdiction [*ad fundandam jurisdictionem*] or found jurisdiction [*ad confirmandam jurisdictionem*] by attachment of certain movable assets of the respondent.

[2] The applicants, ACL Group (Pty) Ltd, Intara Trading CC and

ACL/Intara Gesamentlike Ondernemings are *incola* of the area of jurisdiction of this Court. The respondent is Qick Televentures FZE, a company established and incorporated in the United Arab Emirates. It has registered offices or a principal place of business at 111 Ras Al Khaimah, United Arab Emirates.

- [3] The respondent entered into a contract with Nokia Siemens Network [‘the main contract’] to, amongst other things, supply, install, test, complete and render other services for a fixed and/or mobile telecommunications network in the Republic of South Africa and specifically to install telecommunication cables next to the N1 (national road) between Bloemfontein (Free State province) and Colesberg (Northern Cape province). On 14 February 2011 the respondent was registered as an external company in terms of section 322 of the Companies Act 61 of 1973 [‘the previous Act’], which has subsequently been repealed by the Companies Act 71 of 2008 [‘the current Companies Act’]. The ‘local’ registered address in terms of the aforesaid registration is at West Wing, Birchwood Court, Montrose Street 43, Gauteng province.

- [4] The applicants allege that the second applicant [‘the service provider’] and the respondent concluded an oral agreement for the supply of certain subcontracting services which related to horizontal drilling and ancillary services such as the rental of certain equipment, which agreements were subsequently contained in a written subcontracting agreement, during March 2011. The written agreement provides for the supply, by the service provider, of specific services, associated equipment and materials so as to enable the respondent to satisfy its obligations and liabilities under the main contract. The applicants contend that the written agreement does not correctly reflect the service provider as it refers to ACL/Intara Trading (Pty) Ltd, whilst it should contain the description of the second respondent, to wit Intara Trading CC. The applicants also allege that the first applicant, alternatively the first and third applicant entered into several oral agreements with the respondent for the rental and supply of drilling equipment and material.
- [5] It is the applicants case that the respondent is indebted to them for payment of the amount of R4 437 670.00 arising out of services duly rendered and equipment and material supplied in terms of the

various agreements. The applicants intend to issue summons against the respondent for payment.

[6] The applicants however allege that, by virtue of the respondent being a *peregrinus* defendant, they are required to attach certain movable assets of the respondent in order to either confirm jurisdiction that already exists or to found jurisdiction in this Court.

[7] It is trite that the attachment to found jurisdiction is necessary to create jurisdiction where no other *ratio jurisdictionis* (jurisdictional ground) exists at all. If any recognised jurisdictional ground does exist, then the *incola* still needs to confirm or strengthen the court's jurisdiction by attachment of property of the *peregrinus* defendant (or property wherein the *peregrinus* defendant has a material interest).

[8] Although the papers became quite prolix, the respondent persists only with the following grounds in the order as set out hereunder, and in the alternative to each other, in opposition to the application:

8.1 that the applicants cannot attach any assets of the respondent to found jurisdiction as the defendant is resident in the Republic;

8.2 that the applicants cannot confirm jurisdiction as no *ratio jurisdictionis* exists;

8.3 that the applicants should have approached the South Gauteng High Court to found or confirm jurisdiction as the contract was on the balance of probabilities concluded in that court's jurisdiction and the respondent 'resides' there.

8.4 that the applicants have failed to make out a prima facie case.

[9] It is convenient to make certain general observations regarding applications for attachment to confirm or found jurisdiction. As explained by Harms JA in TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD 2006 (4) SA 177

(SCA) at para 4:

‘The practice of arrest or attachment to found or confirm jurisdiction was firmly established in Holland by the 17th century, in the interest of *incolae* and from considerations of commercial convenience. It enabled them to proceed in local courts against *peregrini* who were, for the time being, physically within the jurisdiction area of the court, or possessed property there. In addition to founding or confirming jurisdiction and to commence proceedings, an attachment had, since those days, an additional function, and that was the provision of security, enabling the plaintiff, eventually, to execute in his own jurisdiction. Pending the finalisation of the proceedings, the defendant could not alienate or encumber the attached property.’

The remedy of attachment *ad fundandam jurisdictionem* in order to create jurisdiction, or *ad confirmandam jurisdictionem* to confirm jurisdiction, are exceptional and extraordinary remedies and should be applied with care and caution. An attachment or arrest serves also to provide an *incola* with property or security in South Africa against which he can execute the judgment in the event of his action being successful. A court to which the application is made has no discretion to refuse it once the requirements for an

order are met. In **LONGMAN DISTILLERS LTD v DROP INN GROUP OF LIQUOR SUPERMARKETS (PTY) Ltd** 1990 (2) SA 906 (A) at 914E - G Nicholas AJA held as follows:

'In our law, once an *incola* applicant (plaintiff) establishes that, *prima facie*, he has a good cause of action against the peregrine respondent (defendant), the Court must, if other requirements are satisfied, grant an order for the attachment *ad fundandam* of the property of the peregrine respondent (defendant). It has no discretion (Pollak The South African Law of Jurisdiction at 64, citing *Lecomte v W and B Syndicate of Madagascar* 1905 TS 696 at 702). The Court will not inquire into the merits or whether the Court is a convenient forum in which to bring the action (Pollak (*ibid*)). Nor, it is conceived, will the Court inquire whether it is "fair" in the circumstances for an attachment order to be granted.'

(See also **NAYLOR AND ANOTHER v JANSEN; JANSEN v NAYLOR AND OTHERS** 2006 (3) SA 546 (SCA) at 559 para 27; **SIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS** 1999 (1) SA 217 (SCA); **WEISSGLASS NO v SAVONNERIE ESTABLISHMENT** 1992 (3) SA 928 (A) at 937C – F; **THERMO RADIANT OVEN SALES (PTY) LTD v NELSPRUIT BAKERIES**

(PTY) LTD 1969 (2) SA 295 (A) at 302C—D.) In **NAYLOR** *supra*

Scott JA held at 560 C-D [para 27] that:

‘It follows that an applicant for an order of attachment or arrest to found or confirm jurisdiction is under no obligation first to invite the respondent *peregrine* to submit to the jurisdiction, nor does the latter enjoy a right to be afforded an opportunity to submit to the jurisdiction before the applicant seeks an arrest or attachment order. (See *Associated Marine Engineers D (Pty) Ltd v Foroya Banki PF* 1994 (4) SA 676 (C) at 688G - J.)’

In the **NAYLOR** case the distinguished Judge also held at 561A that the purpose of the attachment procedure is to assist an *incola*.

[10] In order to succeed with an application for attachment *ad confirmandam jurisdictionem*, the applicant must satisfy the following requirements on a balance of probabilities, to wit:

- (i) a prima facie cause of action against the defendant;
- (ii) that the defendant is a *peregrinus*;
- (iii) that the property in which the *peregrinus* defendant has a

beneficial interest is within the Republic; and

- (iv) that the cause of action arose in the area of jurisdiction of the court.

In order to succeed with an application for attachment *ad fundandam jurisdictionem* the applicant must in addition to (i) and (ii) above prove that the property in which the *peregrinus* defendant has a beneficial interest is within the area of jurisdiction of the court.

- [11] Mr Fischer, on behalf of the respondent, argues that as a point of departure, the applicants have failed to identify whether they apply to confirm jurisdiction, alternatively whether they apply to found jurisdiction. The rationale for the distinction is obvious from what has been set out above. The requirements that the applicant needs to satisfy regarding the afore-mentioned, as stated above, also differs to some extent. As far as the distinction goes, the submission is undoubtedly correct. I do not agree with the submission that the applicants had to elect to apply for either the one or the other. The applicants were entitled to apply that the court ‘confirm or [*alternatively*] found jurisdiction’ (my own

insertion). It created no uncertainty. What needs to be determined is whether the applicants have satisfied the requirements either to confirm or to found jurisdiction.

- [12] The submissions on behalf of the parties clearly show that the real dispute, and the crux of this matter, revolves around whether the respondent is a *peregrinus*. The requirement relates to both an application to confirm or found jurisdiction, as stated above. Although the respondent admits that it is a *peregrinus* of the area of jurisdiction of this court, Mr Fischer, acting on behalf of the respondent, submitted that the respondent's registration as external company in terms of section 322, and the designation of a registered address in terms of section 170 of the previous Act, has as consequence that it carries on business in the Republic of South Africa and is as such sufficiently resident in the Republic to confer jurisdiction, especially insofar as it relates to the contract in question. In amplification of the argument, Mr Fischer relies on the judgements in **SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD** 1982 (2) SA 739 (W) and **APPLEBY (PTY) LTD v DUNDAS LTD** 1948 (2) SA 905 (E). In the **SKJELBREDS** case the court held that the mere fact that an

external company has a registered office or even a branch office, in addition to the registered office in the Republic, does not constitute residence for the purpose of conferring jurisdiction on the Court. Vermooten J held that such external company will however be sufficiently resident if the cause of action also arose from the business activities of the branch.

- [13] If the respondent is resident in the Republic, the application must (not may) be dismissed. Section 28(1) of the Supreme Court Act, which is peremptory, reads:

‘No attachment of person or property to found jurisdiction shall be ordered by a court of any division against a person who is resident in the Republic.’

- [14] Mr Van Rhyn, on behalf of the applicants, relies on the judgment of Streicher J, as he then was, in **JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION** 1997 (3) SA 34 (W), where the distinguished Judge held that an external company cannot be said to be resident at its registered address in terms of section 322 and

170 of the previous Act.

[15] In the heads of argument on behalf of the respondent it is postulated that the respondent's status is still governed by section 322 and 170 of the previous Act, as it was registered in terms of the said Act prior to the date on which the current Companies Act commenced. The applicants also argued the application on this basis. I cannot agree. The current Companies Act came into effect on 1 May 2011. In terms of the transitional arrangements contained in section 2(6) of schedule 5 of the current Companies Act, an external company that, immediately before the effective date, was registered as such in terms of the previous Act must be regarded as having [been] registered on the effective date as an external company in terms of the current Companies Act. It follows that, save for the objective fact that the respondent, as foreign company, was duly registered as an external company in terms of the provisions of the previous Act on the date of the commencement of the current Companies Act, the matter must be decided in terms of the provisions of the current Companies Act [71 of 2008].

[16] The current Companies Act defines a 'foreign company' as an

entity incorporated outside the Republic, irrespective of whether it is: (a) a profit, or non-profit, entity; or (b) carrying on business or non-profit activities, as the case may be, within the Republic. An 'external company' means a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23 (2). Section 23, which deals with the registration and the registered office of an external company, provides as follows:

'Registration of external companies and registered office

- (1) An external company must register with the Commission within 20 business days after it first begins to conduct business, or non-profit activities, as the case may be, within the Republic-
 - (a) as an external non-profit company if, within the jurisdiction in which it was incorporated, it meets legislative or definitional requirements that are comparable to the legislative or definitional requirements of a non-profit company incorporated under this Act; or
 - (b) as an external profit company, in any other case.
- (2) For the purposes of subsection (1), and the definition of 'external

company' as set out in section 1, a foreign company must be regarded as 'conducting business, or non-profit activities, as the case may be, within the Republic' if that foreign company-

- (a) is a party to one or more employment contracts within the Republic; or
- (b) subject to subsection (2A), is engaging in a course of conduct, or has engaged in a course or pattern of activities within the Republic over a period of at least six months, such as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within the Republic.

(2A) When applying subsection (2)(b), a foreign company must not be regarded as 'conducting business activities, or non-profit activities, as the case may be, within the Republic' solely on the ground that the foreign company is or has engaged in one or more of the following activities:

- (a) Holding a meeting or meetings within the Republic of the shareholders or board of the foreign company, or otherwise conducting any of the company's internal affairs within the Republic;
- (b) establishing or maintaining any bank or other financial accounts within the Republic;

- (c) establishing or maintaining offices or agencies within the Republic for the transfer, exchange, or registration of the foreign company's own securities;
- (d) creating or acquiring any debts within the Republic, or any mortgages or security interests in any property within the Republic;
- (e) securing or collecting any debt, or enforcing any mortgage or security interest within the Republic; or
- (f) acquiring any interest in any property within the Republic.

(3) Each company or external company must-

- (a) continuously maintain at least one office in the Republic; and
- (b) register the address of its office, or its principal office if it

has

more than one office-

- (i) initially in the case of-
 - (aa) a company, by providing the required information on its Notice of Incorporation; or
 - (bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and
 - (ii) subsequently, by filing a notice of change of registered office,

together with the prescribed fee.

(4) A change contemplated in subsection (3) (b) (ii) takes effect as from the later of-

(a) the date, if any, stated in the notice; or

(b) five business days after the date on which the notice was filed.

(5) The Commission must-

(a) assign a unique registration number to each external company that has registered in accordance with subsection (1);

(b) maintain a register of external companies;

(c) enter the prescribed information concerning each external company in the register; and

(d) in the case of an external company whose name is a foreign registration number but does not indicate the name of the foreign jurisdiction in which it was incorporated, append to its name on the registry the name of that jurisdiction in a manner comparable to that required for a company under section 11 (3) (a).

(6) If an external company has failed to register in terms of subsection (1) within three months after commencing its activities within the Republic, the Commission may issue a compliance notice to that external company requiring it to-

- (a) register as required by subsection (1) within 20 business days after receiving the notice; or
- (b) if it fails to register within the time allowed in paragraph (a), to cease carrying on its business or activities within the Republic.'

[17] Section 170 and 322 of the previous Act provided as follows regarding the registration of an external company and the designation of a registered address by an external company:

'170(1) Every company, including every external company, shall have in the Republic -

- (a) a postal address to which all communications and notices may be addressed; and
- (b) a registered office to which all communications and notices may be addressed and at which all process may be served.'

'322(1) Every external company shall within twenty-one days after the establishment of a place of business in the Republic lodge with the Registrar, in the prescribed manner-

- (a) a certified copy of the memorandum of the company, and if the said memorandum is not in one of the official

languages of the Republic, a certified translation thereof in one of those languages;

(b) a notice under section 170 in the prescribed form of the registered office and postal address of the company;'

[18] For the same considerations as stated in **ISM INTER v MARALDO AND ANOTHER** 1983 (4) SA 112 (TPD) at 114E-F, the cases dealing with this issue under the previous Act, including those on which the parties rely, cannot be distinguished on the basis of the legislation only that was interpreted. To my mind the current Companies Act contains similar provisions regarding the registration and appointment of a registered office, or put differently, the current Companies Act does not contain provisions that can be said to materially affect the reasoning and *ratio decidendi* of the previous judgments to which I have been referred.

[19] It is trite that at common law the residence of the defendant entrenches the jurisdiction of the relevant forum. (See **JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION** 1997 (3) SA 34 (W) at 37C-D; **BISONBOARD LTD v K BRAUN**

WOODWORKING MACHINERY (PTY) LTD 1991 (1) SA 482 (A)
at 487C).

[20] The question posed in this matter is simply whether a foreign company which has been duly registered as an external company in terms of the Companies Act and which conducts business in the Republic is resident in the Republic for the purposes of section 28(1) of the Supreme Court Act. For the reasons that follow, I am of the opinion that a duly registered external company, conducting business in the Republic, cannot be said to be resident in the Republic for purposes of section 28(1) of the Supreme Court Act, regardless that the cause of action (dispute) arises from the business activities of the external company in the Republic.

[21] It is efficacious to keep in mind that the Companies Act deliberately distinguishes between domestic and external companies. Reference to a company in the Act does not include a reference to an external company. The terms have different meanings and the requirements and obligations pertaining a domestic company differs from the requirements and obligations of

an external company. This was also the position under the previous Act. Admittedly the current Act contains provisions regarding external companies that the previous Act did not. That much is apparent by simply considering section 23. Several sections in the Companies Act deals with external companies, for example the obligation to furnish annual returns (section 33(2) and so forth). A detailed exposé on the different sections and the differences between the current Companies Act and previous Companies Act is, however, not necessary for purposes of this judgment. In **WISEMAN v ACE TABLE SOCCER (PTY) LTD** 1991 (4) SA 171 (W) at 176F – I, it was held that the purpose of registration of an external company under the previous Act, was to ensure that an external company, after complying with such procedures, will be on equal par with a South African incorporated company. That is also the purpose of registration of an external company under the present Act. That does not mean that an external company is resident in the Republic.

- [22] Section 23 requires that an external company continuously maintain at least one office in the Republic and register the address of its office, or its principal office, if it has more than one

office. Section 322, of the previous Act, also required that an external company shall have in the Republic a registered office to which all communications and notices may be addressed and at which all process may be served. In essence, both require the same thing. As has consistently been held, the mere fact that an external company has a registered office or even branch offices and is conducting business in the Republic is not enough to make it resident in the Republic for the purposes of section 28(1) of the Supreme Court Act.

[23] In **JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION**

supra, Streicher J, pointed out that the provisions regarding the keeping of official documents at the registered address of a domestic company do not apply to an external company. This is also the position in the (current) Companies Act. The Judge further held at 38H-39B that:

‘These provisions relating to external companies do not attract the inference that the Legislature intended to endow the registered office of an external company with the quality of being the place to which the world can look as the legal home and administrative centre of the

external company. In my view they indicate the opposite when compared with the provisions relating to the registered address of a domestic company.

Moreover, considerations of commercial convenience and expediency militate against viewing the registered office of an external company as the residence of the external company. Should such registered office be deemed to be the residence of an external company, any *peregrinus* would be entitled to sue the external company in the Court in whose area of jurisdiction the external company's registered office in the Republic is situated, wherever the cause of action may have arisen. The Legislature could, in my view, not have intended such a result. In the premises, in my view, an external company cannot be said to be resident at its registered office in terms of s 322 and s 170 of the Companies Act.'

The ratio is equally relevant to the current Companies Act.

- [24] In **DAIRY BOARD v JOHN T RENNIE & CO (PTY) LTD** 1976 (3) SA 768 (W) it was held that a domestic company registered in South Africa resides in law where the registered office is. If its principal place of business is situated elsewhere it may also reside at the latter place. The finding was subsequently confirmed in **BISONBOARD LTD v K BRAUN WOODWORKING MACHINERY**

(PTY) LTD 1991 (1) SA 482 (A). The *ratio decidendi* was however distinguished in **JOSEPH AND ANOTHER v AIR TANZANIA CORPORATION** 1997 (3) SA 34 (W) at 37C-D, on the basis that the same did not apply to an external company. In **LEIBOWITZ T/A LEE FINANCE v MHLANA AND OTHERS** 2006 (6) SA 180 (SCA), it was held that the principal place of business of a company for jurisdictional purposes, is the place where the central control and management of the company is situated. It is not the respondent's case that the central control and management of the company is situated at its registered address in the Republic. It also appears unlikely that a foreign company would have the seat of its central control and management in another country.

- [25] To this end, and as stated, the court in **SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD** 1982 (2) SA 739 (W), on which the respondent relies, also held that the mere fact that an external company has a registered office and branch office in the Republic (and conducts business in the Republic) does not constitute residence for the purpose of conferring jurisdiction on the Court. In that judgment however the court, as stated, held that the cause of action (the dispute) also needed to arise out of the

business of the external company for it to be resident. This is also referred to as the *causa* qualification. The court followed a long line of cases with this finding. See **LUNT v BALMORAL DIAMOND MINING CO LTD** (1906) 10 HCG 58 at 59 and **APPLEBY (PTY) LTD v DUNDAS LTD** 1948 (2) SA 905 (E) at 909-910. The **SKJELBREDS** ratio was confirmed in **ISM INTER LTD v MARALDO AND ANOTHER**, *supra*. I cannot agree with this line of reasoning. I fail to understand why the mere fact that the cause of action arises out of the business activities of the external company will make it resident, whilst had the cause of action not arisen out of the business activities of the company, it would not have been resident. I am fortified in my view in light of the finding by Harms JA in **TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD** 2006 (4) SA 177 (SCA) at para 3:

‘In the present context, the difference between an arrest or attachment *ad fundandam jurisdictionem* and one *ad confirmandam jurisdictionem* is of no consequence.¹ The reason is that, 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

¹ Ghomeshi-Bozorg v Yousefi 1998 (1) SA 692 (W), where a contrary view was held, it is, to that extent, wrong.

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.'² With 'jurisdiction' is meant the power to adjudicate upon a particular case and to give effect to the judgment.'³

To my mind the findings of the Supreme Court of appeal in **LEIBOWITZ T/A LEE FINANCE v MHLANA AND OTHERS** and **TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD**, read with the finding in the **JOSEPH** case (supra) settles the matter.

[26] The decision in **SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD** *supra*, was considered by the Appeal Court and reversed, but the Court of Appeal, significantly, did not confirm the court's findings with regards to this issue. That Court held that in light of its finding regarding others issues, that the appeal had to succeed and that it was therefore not necessary to deal with the specific point. (See **SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD** 1982 (2) SA 710 (A) at p

2 Ewing McDonald & Co Ltd v M & M Products Co 1991 (1) SA 252 (A) at 258D - G; Naylor v Jansen; Jansen v Naylor [2005] 4 All SA 26 (SCA) in para [20]

3 Steytler NO v Fitzgerald 1911 AD 295 at 346; Hugo v Wessels 1987 (3) SA 837 (A) at 849H; Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation) 1987 (4) SA 883 (A) at 886D - E.

729F - G.) From the afore-mentioned it is clear that the mere registration and continuous maintenance of an office in the Republic and conducting of business, does not in itself make the external company resident in the Republic. The fact that the cause of action (the dispute) arose from the business activities that the external company conducts in the Republic does not make it resident for purposes of section 28(1). It will merely serve as a jurisdictional ground at common law which, depending on whether it arose in the area of jurisdiction where the *incola* is resident, may entitle the *incola* to confirm the court's jurisdiction.

[27] It is necessary, notwithstanding my finding above, to deal with Mr Fischer's submission that Streicher J, when considering the matter in the JOSEPH case, *supra*, was apparently not referred to the dictum in SKJELBREDS REDERI A/S AND OTHERS v HARTLESS (PTY) LTD 1982 (2) SA 739 (W). The Judge admittedly does not refer to the judgment. That does not mean that the Judge did not consider the judgment or the reasoning on which the judgment relies. In the JOSEPH judgment the case of ISM INTER LTD v MARALDO AND ANOTHER 1983 (4) SA 112 (TPD), was thoroughly considered. In the ISM case the judgments

in, *inter alia*, **SKJELBREDS** *supra* and **APPLEBY (PTY) LTD v DUNDAS LTD** 1948 (2) SA 905 (E), with regards to the so-called ‘cause of action qualification’, were considered and discussed. Streicher J clearly considered the reasoning in the respective cases of **SKJELBREDS** and **APPLEBY**.

[28] I am satisfied that the applicants have therefore satisfied the requirement to prove that the Respondent is a *peregrinus* defendant.

[29] The applicants must, either to confirm or found jurisdiction, show the existence of a *prima facie* cause of action against the defendant. As reiterated in **SIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS** 1999 (1) SA 217 (SCA) at 228C-D, this requirement is satisfied if:

‘. . . an applicant shows that there is evidence which, if accepted, will establish a cause of action. The mere fact that such evidence is contradicted will not disentitle the applicant to relief - not even if the probabilities are against him. It is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should

be refused. (MT Tigr: Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening) 1998 (3) SA 861 (SCA) at E 868B--H)'

(See also **LONGMAN DISTILLERS LTD v DROP INN GROUP OF LIQUOR SUPERMARKETS (PTY) LTD** 1990 (2) SA 906 (A) at 914E-F).

[30] The respondent disputes that the applicants have satisfied this requirement, because it is alleged that the applicants rely on 'so-called' amendments and alterations to the contract and its pricing as basis for their cause of action. The respondent says that any amendments will be hit by the 'non-variation' clause (or so-called *Shifren* principle), as the amendments and alterations were not in writing.

[31] I am satisfied that the applicants have passed the low threshold to satisfy this requirement. The papers show, *prima facie*, correspondence from the respondent regarding the amendment of orders and the pricing for drilling. Furthermore, the first and/or

third applicant relies on separate oral agreements with the respondent. The respondent itself admits payments for the rental of equipment. It is clear that services were rendered. At the very least, it cannot be found if the evidence is assessed as a whole, that the applicants clearly have no action, or cannot succeed. The same applies for the intended claim for rectification.

[32] The applicants also need to prove, in order to satisfy the third requirement, that the property which they seek to attach

- (a) is property in which the respondent has a beneficial interest;
- (b) that the property is within the Republic for purposes of confirming jurisdiction if the cause of action arose in the court's area of jurisdiction; or
- (c) that the property is within this court's area of jurisdiction if they seek to found jurisdiction.

[33] It is common cause between the parties that the property is not situated in the area of jurisdiction of this court, but that it is situated in the Republic. Although the respondent has not disclosed the exact location, it is common cause that the property was situated

in the Northern Cape Province, where it would be utilised, when these proceedings were initiated. The respondent denied in its papers that it is the owner of the property. The evidence on a whole shows that, at the very least, the respondent has a beneficial interest in the property.

[34] The applicants must lastly prove that the cause of action arose in the court's area of jurisdiction for confirmation of jurisdiction. On the evidence as it stands it cannot be found that any of contracts on which the applicants rely, were concluded in this Court's area of jurisdiction. The respondent however admits that part of the contract was to be executed in the Free State Province. This is also supported by the invoices which were rendered. As was held in **ROBERTS CONSTRUCTION CO LTD v WILLCOX BROS (PTY) LTD** 1962 (4) SA 326 (A), a High Court has jurisdiction in terms of a cause of action in terms of section 19(1)(a) of the Supreme Court Act when a material element of the cause of action falls in that court's jurisdiction, such as partial performance of the contractual obligations in the area of jurisdiction of such court. This court will therefore have jurisdiction over the cause of action. As such a jurisdictional ground exists that can be confirmed to

strengthen the court's jurisdiction. (See also **THOMAS v BMW SOUTH AFRICA (PTY) LTD** 1996 (2) SA 106 (C).)

[35] For these reasons I am satisfied that the applicants have met all the requirements for an order that the property of the respondent be attached *ad confirmandam jurisdictionem*.

[36] In the result I make the following order:

1. The application succeeds;
2. An order is granted in terms of prayer 1 of the applicants Notice of Motion;
3. The attachment will lapse if the applicants fail to institute an action in this division against the respondent within 30 days after this order, the day of the order to be excluded and the last day to be included in calculation of the 30 day period;

4. The respondent is ordered to pay the costs of the application, such costs to include the costs occasioned by the employment of two counsel.

SNELLENBURG, AJ

APPEARANCES: On behalf of the applicant:

Adv AJR van Rhyn SC, assisted by

Adv P du P Greyling

Eugene Attorneys,

Bloemfontein

On behalf of first respondent:

Adv PU Fischer,

Instructed by:

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