Case no. 442/88

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LONGMAN DISTILLERS LIMITED Appellant

and

THE DROP INN GROUP OF LIQUOR

SUPERMARKETS (PTY) LTD Respondent

Coram: CORBETT CJ, E M GROSSKOPF, KUMLEBEN JJA, NICHOLAS et GOLDSTONE AJJA

Heard: 22 March 1990

Delivered: 30 March 1990

JUDGMENT

NICHOLAS AJA:

The appellant is Longman Distillers Ltd ("Longman"), a firm of distillers which carries on its business in Leith, Edinburgh, Scotland. The respondent is The Drop Inn Group of Liquor Supermarkets (Pty) Ltd ("Drop Inn"), which is engaged in the marketing of liquor. Longman and Drop Inn have had business dealings with each other, in the course of which, according to Drop Inn, Longman became indebted to it in respect of damages in the amount of £40 286,00 (R127 271,89). On 19 May 1988 **FRIEDMAN J**, sitting in the Cape Provincial Division ("the CPD"), granted an order against Longman on the application of Drop Inn:

"(a) Authorising the deputy sheriff of this Court to attach, in order to found and/or confirm jurisdiction, all respondent's right, title and interest in and to the order for costs awarded respondent in case 644/1987 against applicant.

(b) Granting applicant leave to sue respondent by edictal citation for:

1. Payment of the sum of R127,271,89.

2. Interest thereon **a tempore morae**.
3. Alternative relief.
4. Costs of suit.

....

The judgment is reported **sub nom**. **Drop Inn Group of Liquor Supermarkets (Pty) Ltd v Longman Distillers Ltd** 1988(4) SA 35(C). It will be referred to as "the reported judgment".

With the leave of the court **a quo**, Longman now appeals against the order.

It was not disputed by Longman that Drop Inn established the essential requirements for an order of attachment **ad fundandam aut confirmandam jurisdictionem**. Drop Inn is an **incola** of the area of jurisdiction of the CPD; Longman is a **peregrinus**. Drop Inn has established **prima facie** that it has a valid claim for R127 271, 89 against Longman. Longman owns property within the area of jurisdiction of the CPD, namely, rights under an order for costs granted against Drop Inn by the CPD. It is conceded on behalf of Longman (and it was so held in the reported judgment at 36 F-H), that a right arising from an award of costs is capable of attachment to found and confirm jurisdiction (**Araxos (East London) (Pty) Ltd v Contara Lines Ltd and Others** 1979(1) SA 1027 (ECD); and that "an existing claim by the prospective peregrine defendant against the prospective **incola** plaintiff is, ordinarily speaking, attachable in order to found jurisdiction in the proposed action." (**Thermo Radiant Oven Sales (Pty) Ltd. v Nelspruit Bakeries (Pty Ltd)** 1969(2) SA 295(A) at 300 F-G.)

In form the order was a simple order of attachment, but if it had been refused the effect would have been that the CPD declined to exercise jurisdiction in the proposed action. The rule of Roman Law was actor sequitur forum rei, and the arrest of the property or person of a peregrinus to found jurisdiction was only introduced into the Roman-Dutch law under the influence of Germanic custom. This was actuated by the desire of the Dutch to assist incolae to litigate at home, and to avoid the expense to which citizens would be put if they had to pursue a **peregrinus** to the court of his domicile. The procedure was conceived primarily for the benefit of the **incola**. (See **Thermo Radiant Oven Sales (supra)** at 301 A **per** **OGILVIE THOMPSON JA**; and at 305 C-G **per** **POTGIETER JA**). It is against this background that the submissions made by appellant fall to be considered. They are three in number.

The first submission was as bold as it is novel: that the law recognizes that orders for costs are absolutely immune from attachment. The argument as I understood it was this. Certain assets are immune from attachment (see Van Zyl, The Theory of Judical Practice of South Africa, 3rd ed. pp 262-263), including students' books, which are necessary for the particular studies in which they are engaged, and necessary wearing apparel and food procured for sustenance. The immunity is founded on public policy, and a similar immunity should be accorded to an order for costs, which is more than a mere money judgment, since it provides the key for access for the courts. The logic of the argument is faulty. The fact that a costs order may be attached does not have the effect of denying anyone access to the courts. Nor is it calculated to discourage legal proceedings: some countries (the United States for example) do not in all cases have awards for costs such as we know them. Moreover, s. 39 of the Supreme Court Act, 59 of 1959, sets out a list of property not liable to be seized in execution of any process, and there are, apart from the section, other classes of property which are exempt from attachment. (See Nathan, Barnett & Brink Uniform Rules of Court, 3rd ed., p. 640). A costs order is not one of those mentioned, and I do not know of any power in the courts to create new items of exemption.

There is therefore no merit in the first submission.

The second submission is a narrower one, and is based on the facts which gave rise to the application. The history of the matter is fully summarized in the reported judgment at 35 F-36 F and it is unneccessary for present purposes to repeat it. The essential facts are that in January 1987 Drop Inn was granted (i) a rule <u>nisi</u> calling upon Longman to show cause why an amount of R133 721,88, which was standing to the credit of Longman in a suspense account at the Standard Bank, should not be attached <u>**ad confirmandam jurisdictionem**</u> in an action which Drop Inn proposed to bring against Longman; and (ii) an order interdicting the Standard Bank from paying out to any person the said sum or any part thereof pending the return day of the rule <u>nisi.</u> On the return day **BURGER J** discharged the rule <u>nisi</u> and set aside the interdict, and ordered Drop Inn to pay the Bank's costs and Longman's costs. It is the latter costs order with which this appeal is concerned.

Immediately after **BURGER J** made the order, Drop Inn, which had armed itself in anticipation with a previously prepared notice of motion and founding affidavit, applied in the motion-court for an order attaching __ad fundandam__ all Longman's rights in the order for costs. That application came to grief for lack of notice to Longman, but it was later renewed and came before **FRIEDMAN J**, who granted the order now under appeal.

Longman disavows any suggestion that the application was made **mala fide** or that it constituted an abuse of the process of the court. The submission is that it is contrary to public policy to permit the attachment of the award of costs in these circumstances: the consequence of allowing the attachment "would be, in effect, to prevent a **peregrinus** who does not wish to submit to the jurisdiction of the court from opposing the grant of an attachment order unless he waives his right to recover costs occasioned by such opposition." I do not agree. The prospect of the attachment of an order for costs would not itself deter a **peregrinus** from opposing legal proceedings for attachment **ad fundandam**. Such a prospect should, no doubt, make him hesitate, if he is sufficient prescient, to ask costs of opposition, the grant of which would result in his becoming possessed of an asset within the jurisdiction, thus rendering him vulnerable to proceedings for an attachment ad fundandam. But it should do no more than that.

Public policy is an imprecise and elusive concept. It is said to reflect the mores and fundamental assumptions of the community (Cheshire Fifoot and Furmston's Law of Contract 11th ed., p. 345.) Wessels, Law of Contract in South Africa, Vol 1 s. 488, says: "An act which is contrary to the interests of the community is said to be an act contrary to public policy." Public policy is the general sense of justice of the community, the **boni mores**, manifested in public opinion. (**Lorimar Productions Inc. & Others v Sterling Clothing Manufacturers (Pty) Ltd** 1981(3) SA 1129(T) at 1152-1153 **per** **VAN DIJKHORST J** See also **Schultz v Butt** 1986(3) SA 667(A) at 679 C). When a court is asked to hold that something is against public policy, it does well to remind itself of the much-quoted passage in the judgment of **BURROUGH J** in Richardson v Mellish (1824), 2 Bing 229 at 252; 130 ER 294 at 303:

> "I, for one, protest .... against arguing too strongly upon public policy; - it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

I cannot see how public policy can be at all involved in a question whether a particular incorporeal right should be attached **ad fundandam**, or whether a particular **incola** should be permitted to sue a particular **peregrinus** in the CPD. Only the interests of Longman and Drop Inn are involved, not the interests or general sense of justice of the community. The question does not raise any important moral issue, or any principle affecting the fundamental assumptions of the community. It seems to me that **au fond** Longman's objection is that the attachment was "unfair"; and that its representatives have attempted to elevate this into a matter of public policy.

Basically, the argument that it is unfair is that, when a man has beaten off an attack, the order which he has obtained indemnifying him for the costs which he incurred in the process, should not be used against him in a renewed attack. (See the reported judgment at 37 E-G). It is an argument with which one can have some sympathy, but it cannot in my opinion be a justification for refusing an order of attachment.

It was pointed out by **JOUBERT JA** in Bank of Lisbon and South Africa Ltd v De Ornelas and Another 1988(3) SA 580(A) at 606 A-B that in administering the law, the Dutch courts paid due regard to considerations of equity, but only where the equity was not inconsistent with the principles of law, and that is also the position adopted by South African courts.

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, p. 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.

In my opinion there is no substance in the second submission.

The appellant's third submission is a narrow one. It is that the original application for an attachment and an interdict was attended by a number of irregularities on the part of Drop Inn, and that to allow Drop Inn to attach the costs awarded to Longman in those proceedings would amount to a condonation of an abuse of the process of the court.

In his judgment on that application, **BURGER J** said:

> "No interdict (sc. against the Bank) was asked for in the original application... The Bank was not cited as a party, nor was notice of the application given to it. It was not disclosed to the court that the Bank was opposed to an interdict against the debit of Drop Inn's account, nor was the agreement in terms whereof Drop Inn would place no barrier against the remittance of such funds to Longman disclosed to the Court."

He concluded by saying that in view of the grave irregularities at the time of its issue, the interdict against the Bank could not stand.

Counsel for the appellant addressed to us detailed argument regarding Drop Inn's conduct in those proceedings, but it is not necessary to refer to it, because I cannot see that, whatever irregularities may have been committed by Drop Inn in the original application, they can have any bearing on its right to seek and obtain an order for attachment under the present application. The essential fact is that Longman became possessed of property attachable within the area of jurisdiction of the CPD; the genesis of that property was irrelevant.

The appeal is dismissed with costs.

H C NICHOLAS AJA

CORBETT CJ
E M GROSSKOPF JA
KUMLEBEN JA CONCUR
GOLDSTON, AJA