

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 20758/2013

In the matter between:

CHANINE ELIZABETH SWANEPOEL

Plaintiff

and

DEPUY INTERNATIONAL LIMITED

Defendant

Coram: Wille, J

Heard: 25 October 2024

Delivered: 21 January 2025

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is a trial about an interlocutory issue concerning the jurisdiction of this court. The parties will be referred to as cited in the pending main action proceedings. The defendant filed a special plea challenging the jurisdiction of this court.¹

[2] The plaintiff underwent hip replacement surgery more than a decade ago, and during this process, a specified hip replacement system was implanted into her right hip.²

[3] It is averred that the defendant manufactured the system that was implanted into her hip. It is alleged that the system was defective because it had certain latent defects.³

[4] It is further alleged that the defendant was negligent, among other things, by ignoring specific warnings about these alleged latent defects in the system and failing to withdraw the system from the marketplace before the hip replacement surgery was performed on the plaintiff.⁴

[5] Further, it is advanced that as a direct result of this negligence on the defendant's part, the plaintiff suffered damages, and she still suffering these damages in a not insignificant amount.⁵

[6] The plaintiff's action is in delict and is essentially a product-liability claim. The defendant concedes this much. The defendant filed a special plea on jurisdiction and pleaded over on the merits.⁶

[7] It was alleged that if the special plea succeeded, it would be dispositive of the entire action. This is the reason for separating the jurisdiction issue from the hearing of the main action proceedings.⁷

¹ The defendant submitted that this court had no jurisdiction to determine the action proceedings,

² This system was known as the 'ASR Hip Resurfacing System' (the "system").

³ The defendant recalled the system because of latent defects.

⁴ The system implanted into the plaintiff had to subsequently be removed from the plaintiff.

⁵ The plaintiff alleges damages in the sum of R8 041 376,15.

⁶ The defendant took the position that this court did not have jurisdiction to determine this dispute.

[8] Since the launch of the application for a separation, the plaintiff filed a notice of intention to amend its claims against the defendant.⁸

[9] The defendant did not oppose the amendments sought, which have since formally been effected.⁹

BACKGROUND AND CONTEXT

[10] The plaintiff instituted these proceedings more than a decade ago, seeking damages from the defendant. A medical doctor was initially cited as the second defendant, but the action against him was subsequently withdrawn, and the action continued against the current defendant only.¹⁰

[11] As alluded to earlier, the defendant filed a special plea and pleaded over on the merits about ten years ago. The essence of the special plea was that this court did not have the requisite jurisdiction over the defendant, which was cited as a foreign company, registered abroad.¹¹

[12] By agreement and by order of this court, the special plea was separated out for prior determination. The defendant's special plea alleges that this court lacks the requisite jurisdiction to entertain the plaintiff's damages claim.¹²

[13] The core complaint by the defendant is that the plaintiff failed to attach property to 'found or confirm' this court's jurisdiction over the foreign defendant company and that this is fatal to the plaintiff's action from a jurisdictional point of view. Thus, it is alleged that the plaintiff is non-suited as a consequence.¹³

⁷ The parties agreed that the special plea be adjudicated first.

⁸ The plaintiff filed a number of amendments relating to the citation of the defendant.

⁹ The proposed amendments have since been formally effected in terms of the court rules.

¹⁰ The proceedings against the medical practitioner were resolved.

¹¹ The plaintiff's amendments sought to rectify this alleged jurisdictional issue.

¹² By agreement an order was granted by the court on 13 June 2023.

¹³ The defendant pleaded that the defendant could not be regarded as a foreign company conducting business in this country following section 23(2) of Act 71 of 2008 (the 'Companies Act').

[14] Firstly, I must consider and determine whether or not the defendant submitted to the jurisdiction of this court. If that question is answered in the plaintiff's favour, the special plea must be dismissed. Secondly, if there was no submission to jurisdiction, I must determine whether or not the plaintiff's failure to attach property to found or confirm jurisdiction is fatal to her action. Concerning the second issue, it is the plaintiff's case that even if there was no submission to this court's jurisdiction, this court is invited to apply a flexible approach to jurisdiction such that an attachment of property to found or confirm jurisdiction, in this case, is no longer an absolute jurisdictional requirement.¹⁴

[15] The court was urged to consider issues of appropriateness and convenience, taking into account the circumstances of this case. The plaintiff says this because the defendant was conducting business within the territory of this court when the summons was served, which she says (on its own) is sufficient to clothe this court with jurisdiction to hear and determine these proceedings.¹⁵

[16] Finally, and in the alternative, the plaintiff argues that the common law rule necessitating an attachment to found or confirm jurisdiction is incompatible with our current constitutional values and that I have a constitutional duty to develop the common law to accord with these values.¹⁶

THE PLEADINGS

THE PLAINTIFF'S CLAIMS

[17] The plaintiff's particulars of claim (as amended) reflected that the plaintiff is a veterinary nurse and she is a resident of this country. As far as the defendant is concerned, the following:

- (a) The defendant is DePuy Orthopaedics Inc ('DPO'), DePuy (Ireland) Limited ('DPI'), and Johnson & Johnson Inc ('J&J'), all foreign

¹⁴ The court was asked to develop the common law (if required).

¹⁵ The plaintiff says this is a factual issue to be determined in her favour.

¹⁶ This, if I find for the defendant on the other jurisdictional shields raised by the defendant.

companies as defined in section 1 of the Companies Act (and that was the case as at 20 January 2014).

- (b) The defendant and/or DPO and/or DPI and/or Johnson & Johnson Medical (Pty) Limited ('J&JM') and/or Orthomedics (Pty) Limited ('OPY') and/or Orthomedics Management Company (Pty) Limited ('OMC') were subsidiary companies of J&J and/or one or more were related to the defendant as envisaged in section 2 of the Companies Act.
- (c) At all material times and until at least 20 January 2014, the defendant carried on and conducted business within this Honourable Court's area of jurisdiction at Block A, Parklane, corner of Alexander and Parklane Roads, Pinelands, Western Cape Province, which address was its principal place of business within the Republic and/or within this Honourable Court's area of Jurisdiction.
- (d) In the alternative, at all material times and until at least 20 January 2014, DPO and/or DPI and/or JJM and/or OPY and/or OMC carried on and conducted business within this Honourable Court's area of jurisdiction as the duly authorised agent(s) of the defendant, alternatively as the duly authorised agent of all the manufacturing companies in the J&J group of companies for the system.¹⁷

[18] Regarding the system, the plaintiff alleges that at Constantia Berg Medi-Clinic, Dr Hanna inserted the system in the plaintiff's right hip. The defendant manufactured the system.¹⁸

[19] Through a letter dated 6 December 2010, Dr Hanna informed the plaintiff that the defendant was recalling the system. On 6 April 2011, Dr Hanna received the results of a test of the plaintiff's blood sample, indicating a high level of microscopic

¹⁷ For all their Hip Resurfacing Systems.

¹⁸ This was not the subject of any dispute.

metal particles in the vicinity of her right hip. Dr Hanna accordingly recommended surgery to replace her right hip implant with a 'non-metal bearing and a stemmed' prosthesis.¹⁹

[20] On 23 June 2011 at Constantia Berg Medi-Clinic, Dr Hanna removed the system and implanted a coral stem with a pinnacle cup with a ceramic-on-ceramic liner ('the prosthesis') in the plaintiff's right hip.²⁰

[21] On 3 July 2011, the prosthesis dislocated while the plaintiff was in bed at home. After that, under general anaesthetic, Dr Hanna, at Constantia Berg Medi Clinic, relocated the prosthesis.²¹

[22] On 4 July 2011, an x-ray revealed the prosthesis had again dislocated. On 5 July 2011, Dr Hanna inserted a dual mobility femoral head on a polyethylene internal liner in a shell on the prosthesis to attempt to stabilise the dislocation of the prosthesis.²²

[23] It is alleged that as a consequence of the plaintiff's hip implant/s, the subsequent hip revision and the subsequent insertion of the dual mobility cup, the plaintiff: - (a) suffered (and will suffer) shock, pain and discomfort; (b) has incurred and will in the future incur medical and psychological expenses and, (c) has and will suffer a loss of earning capacity because of enforced early retirement.²³

[24] Further, the plaintiff says these consequences are due solely to the negligence of the defendant, who manufactured the initial latently defective system. The pleaded claim against the defendant is for damages, interest, and legal costs.²⁴

[25] The plaintiff also alleges that if his court finds that it does not have the requisite jurisdiction to entertain and determine the plaintiff's claim in terms of the

¹⁹ This was the second hip replacement surgery performed on the plaintiff.

²⁰ This was a hip replacement manufactured from a totally different type of material.

²¹ This was then the third surgical operation performed on the plaintiff.

²² Another surgical procedure followed.

²³ These allegations are made in support of the damages claim to the sum of R8 041 376,15.

²⁴ The damages allegedly suffered have been separately pleaded.

common law, then I should develop the common law by declaring that absent the attachment of property of a foreign *'peregrinus'* to found or confirm jurisdiction considerations of appropriateness and convenience are nonetheless be sufficient to clothe this court with the jurisdiction in these circumstances.²⁵

THE DEFENDANT'S SPECIAL PLEA

[26] The defendant admits to having manufactured the system. However, in its (amended) special plea, the defendant avers that:

- (a) The defendant is a private limited company duly registered in the United Kingdom, and its registered address is in Leeds, West Yorkshire.
- (b) It does not have a registered office or principal place of business within the area of jurisdiction of this Honourable Court.
- (c) The defendant is not registered as an external company, nor does it meet the requirements to be so registered.
- (d) At all material times, the defendant did not carry on or conduct business for profit within this Court's jurisdiction.
- (e) None of the companies listed by the plaintiff (in her amended particulars of claim) are or were the defendant's agents in the Republic of South Africa.
- (f) None of the said companies are *'linked'* to the defendant.
- (g) Neither the defendant nor any of the companies referred to above are subsidiaries of J&J.

²⁵ This is the alternative claim by the plaintiff regarding jurisdiction.

- (h) The defendant is a foreign *peregrinus* of the Republic.
- (i) The plaintiff should have obtained prior leave to institute these proceedings.
- (j) The plaintiff also failed to attach any assets of the defendant in the Republic of South Africa to found and/or confirm the jurisdiction of this Court.²⁶

[27] The defendant's special plea avers that this court lacks jurisdiction to entertain the plaintiff's claim. The defendant seeks dismissal of the plaintiff's claim with costs. The defendant (as I understand it) states that the plaintiff should have attached assets in this country to find or confirm the jurisdiction of this court.²⁷

THE PLAINTIFF'S REPLICATION

[28] The plaintiff replicated and pleaded that the defendant had, in any event, submitted to the jurisdiction of this court by conduct before the institution of the action because:-

- (a) The defendant implemented a recall of the system in South Africa. In doing so, the defendant appointed Crawford and Company SA (Pty) Ltd ("C&C") in Sandton and also local attorneys to deal with all claims regarding the system.
- (b) In the '*Patient Consent Form*' that the plaintiff was requested to complete, which was provided to her (by Dr Hanna as part of the system recall), the defendant nominated an address in South Africa to which the form should be returned as follows:

(i) '*...DePuy International Limited*

²⁶ This is the core shield raised by the defendant.

²⁷ This is the focus of the defendant's special plea on jurisdiction.

(ii) *c/o Crawford and Company (SA) (Pty) Ltd Crawford House,
17 Muswell Road South, Bryanston 2021, South Africa
P.O. Box 782023, Sandton 2146, South Africa...*

- (c) The '*Information for Patients*' document provided to the plaintiff by the defendant's attorneys invited the plaintiff to contact a helpline, and the list of telephone numbers provided included a South African contact number.
- (d) Before the commencement of the action, the defendant's attorneys addressed a letter to the plaintiff's attorneys wherein the defendant invited the plaintiff to agree to a process in terms of which:
 - (i) the operation of prescription would be suspended but would run again after receipt of a notice (by either party) to that effect, and
 - (ii) the defendant nominated South African attorneys to receive any such notice on its behalf.
- (e) The defendant accepted service of the summons in these proceedings (at Block A, Parklane, Corner Alexander and Parklane Road, Pinelands) on the defendant's behalf.
- (f) By implementing the system's recall in the manner set out above, the defendant was undoubtedly conducting business in South Africa.²⁸

[29] Accordingly, the replication asserts that the defendant unequivocally proclaimed its willingness to submit to the jurisdiction of the South African courts.²⁹

THE TRIAL PARTICULARS

²⁸ These factual allegations were not materially engaged with by the defendant.

²⁹ These averments are made with reference to the surrounding factual circumstances.

[30] The defendant provided trial particulars to the effect that the system manufactured by the defendant (which was initially implanted into the plaintiff) was being distributed in this country; it was done so by the local agent of DPI.³⁰

[31] The defendant averred that it no longer possessed a copy of this distribution agreement. However, the defendant admitted that it manufactured the system. Still, it denied having sold or distributed the system to its agent and claimed not to know who distributed it to DPI. Subsequently, the defendant asserted that this sole agent sold all of its assets to DPI, who, in turn, became the local agent of J&JM.³¹

[32] Before the trial, the plaintiff sought an admission as to whether or not the defendant had any property located or situated in this country at the time of the commencement of this action. The defendant declined to make the admission sought by the plaintiff.³²

THE PLAINTIFF'S CASE

DR HANNA

[33] He is an experienced orthopaedic surgeon who testified that he had performed several medical procedures concerning the plaintiff's right hip. The first procedure was resurfacing the plaintiff's right hip using the system. The second procedure was removing and replacing the system with the prosthesis.³³

[34] The third procedure was stabilising the dislocation of the prosthesis by inserting a femoral head. Dr Hanna testified that the barcode removed from the system's packaging used in the first operation reflects the defendant's name.³⁴

³⁰ "Orthomedics" was recorded as the exclusive agent for DPI in South Africa.

³¹ Johnson and Johnson Medical.

³² This was recorded in the defendant's "Response to Request for Admissions".

³³ This was in connection with the system that was recalled due to latent defects.

³⁴ This was not the subject of any dispute.

[35] The barcode taken from the packaging of the prosthesis used in the second operation reflects the name of DPO. The barcode taken from the devices used in the third operation demonstrates the name of '*De Puy France*'. When a device was needed locally, he would contact '*Orthomedics*' (OM). He said this was the local company representing '*Depuy*' (DP) in Cape Town. Dr Hanna regarded OM as the defendant's local franchise for the products he needed and, more importantly, for the system's supply.³⁵

[36] Concerning the system's recall, his evidence was that he was contacted by DP requesting that he inform his patients about the recall. DP gave him a template letter (which he modified) and then sent it to his patients, including the defendant.³⁶

[37] DP appointed a local company to handle South African patients. The local telephone number on the information for the patient document he provided to the defendant was for this local company.³⁷

[38] Further, he testified that there was no cure for the continuing pain and discomfort that the plaintiff experienced after the various operations she underwent. Thus, he corroborated to a limited extent the allegations made by the plaintiff in support of her claim for damages.³⁸

MR WIESE

[39] OM employed him, and he was involved in the local market to supply the 'system'. After some time, he became employed by J&JM.³⁹

[40] OM and J&JM occupied the address where the summons was initially served. He testified that this was the case when OM initially employed him and later when J&JM employed him.⁴⁰

³⁵ Similarly, this was not the subject of any dispute.

³⁶ This evidence was not disputed.

³⁷ Crawford & Company (SA) (Pty) Ltd.

³⁸ However, accepting this was not the purpose for which his evidence was tendered..

³⁹ During 2011.

⁴⁰ Block A, Parklane, Corner Alexander & Parklane Road, Pinelands.

[41] According to him, OM was DP's exclusive local agent. In addition, DP provided the staff for OM. DP was also responsible for both the online and in-person training at OM. OM also reported to DP abroad, where the defendant is based.⁴¹

MS VIVIER

[42] At this time, she was a candidate attorney in the employment of the plaintiff's attorneys and testified to the accuracy of her contemporaneous file note she had made.⁴²

[43] The filed note made by her at the time and before the summons was served recorded the following:

'...TC to DePuy Int. Ltd @ Pinelands

spoke to Steve – their address in Pinelands is:

Block A

Parklands

cnr of Alexander and Parklane

*They have merged with a company, Synthes & they are now referred to as DePuy Synthes & not DePuy International Ltd...'*⁴³

MS BLAKE

[44] She is a qualified conveyancer who testified that specific electronic searches performed by her revealed: (a) that she could find no record of immovable property ever having been registered in the name of *DePuy International Limited* or DP; (b) that OM was initially incorporated as '*DePuy S.A.*' and (c) that '*Orthomedics Management Company*' was initially incorporated as '*DePuy International Limited*'.⁴⁴

⁴¹ In Leeds in the United Kingdom.

⁴² Dated 13 January 2014.

⁴³ This was a record of a contemporaneous note made by the witness.

⁴⁴ In 1991.

THE EXPERT EVIDENCE

[45] The defendant initially closed its case without leading any evidence. The defendant thereafter applied to admit further limited evidence confirming that the defendant was a patentee for several patents it had registered in South Africa. The defendant applied for leave to re-open its case and call an expert in the field of patent law. The plaintiff did not oppose this application.⁴⁵

[46] Thereafter, the experts filed a joint minute and agreed: (a) that the defendant was the registered patentee concerning at least two valid patents in force when the plaintiff issued her summons; (b) that both such patents could be attached to found or confirm jurisdiction and, (c) although neither patent had been valued, the fact that they had been maintained on the register and their annual renewal fees had been paid was indicative of the patents being of sufficient nominal value to the defendant.⁴⁶

CONSIDERATION

SERVICE OF THE SUMMONS

[47] The return of service concerning the summons is *prima facie* evidence that the defendant accepted service of the summons locally. Service at a place which is not the company's prominent place of business but is its principal place of business in this jurisdiction constitutes good service..⁴⁷

[48] Thus, at the very least, the defendant is properly before this court. I say this because the defendant was able to enter an appearance to defend and file pleadings duly represented by attorneys and counsel.⁴⁸

⁴⁵ The parties agreed that they could each present expert evidence on this limited issue.

⁴⁶ The parties agreed on the issue of nominal value and not on the issue of saleable value.

⁴⁷ *Federated Ins Co Ltd v Malawana* 1986 (1) 729 (AD) at 758H–759H.

⁴⁸ *Investec Property Fund Limited v Viker X (Pty) Limited* 2016 JDR 0904 (GJ) paragraph 11-13.

[49] The defendant says that the summons was not served on the defendant in this country and submits that the summons was only served to the defendant's local agent in this country. This argument is challenging to follow because the defendant's original plea was filed on behalf of DPIL and not on behalf of J&JM.⁴⁹

[50] The defendant submitted that the summons was served on OM, the agent for J&JM. However, in the same breath, the defendant admitted that the return of service, reflecting service of the summons, is *prima facie* evidence of its contents and did not present any evidence to gainsay this *prima facie* evidence.⁵⁰

SUBMISSION TO JURISDICTION

[51] A submission to the jurisdiction of this court by a foreign *peregrinus* defendant in an action brought by an *incola* plaintiff is sufficient for the court to assume jurisdiction.⁵¹

[52] Whether this has occurred is a factual question to be considered by this court. Thus, I must consider whether the cumulative effect of all the facts proved has established submission to this court's jurisdiction on a balance of probabilities.⁵²

[53] The onus in this case rests with the plaintiff. Thus, the plaintiff must establish that the defendant has submitted or consented to jurisdiction by conduct consistent with acquiescence and the test is objective.⁵³

[54] In this connection, the plaintiff contends for the following facts: (a) the defendant implemented the recall of the system in South Africa, (b) the defendant supplied a template letter which was addressed to the plaintiff in this country, (c)

⁴⁹ Article 1.11 of the "Unidroit Principles of International Commercial Contracts (2016)" provides that where a party has more than one place of business the relevant place of business is that which has the closest relationship to the contract and its performance.

⁵⁰ The defendant did not present any *viva voce* evidence in this connection.

⁵¹ *Ingosstrakh v Global Aviation Investments (Pty) Ltd & Others* 2021 (6) SA 352 (SCA) at paragraphs 29 to 47.

⁵² *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 SCA at paragraph 13.

⁵³ *National Arts Council and another v Minister of Arts and Culture and another* 2006 (1) SA 215 (C) at paragraphs 37 to 38.

attached to this letter was a 'patient consent form' to be completed and filed in this country (d) the defendant undertook to pay for the examination and any medical follow up in this country, and (e) the defendant recorded the intention to cover all the reasonable and customary costs of testing and remedial treatment if required, including revision surgery associated with the system recall in this country.⁵⁴

[55] In addition, a helpline was established in this country, and the defendant appointed a local company and local attorneys to deal with claims about the system⁵⁵.

[56] Most importantly, after the plaintiff's revision surgery, some money was reimbursed locally on behalf of the defendant, albeit with no admission of liability. The entire recall implementation occurred in this country. Finally, the attorneys for the defendant recorded the defendant's willingness to submit to our law and process.⁵⁶

[57] The plaintiff's primary case is that when these facts are considered together, the defendant's unequivocal conduct demonstrates a clear intention by the defendant to submit to this court's jurisdiction.⁵⁷

[58] I am in wholesale agreement with this argument. However, even if I am wrong on this score, this court has jurisdiction to determine this matter for several other reasons. I say this because our law has developed to the point where a court must examine whether the forum sought to be employed has a 'real and substantial' connection with the action regarding the relevant connecting factors that tie the action to the forum in question. Put another way, the attachment of property to found or confirm jurisdiction is no longer an absolute requirement in suits against foreign *peregrini*.⁵⁸

⁵⁴ These were all offers and tenders to accepted and performed in this country.

⁵⁵ Crawford and Company SA (Pty) Ltd.

⁵⁶ Compensation was based on South African Law and process.

⁵⁷ National Arts Council and Another v Minister of Arts and Culture and Another 2006 (1) SA 215 (C) at paragraphs 37 to 38.

⁵⁸ Competition Commission v Bank of America Merrill Lynch International Ltd and Others 2020 (4) SA 105 (CAC) at paragraph 51.

[59] The defendant wisely conceded that an attachment is no longer an absolute requirement in suits against foreign *peregrini* where the summons was served on the defendant in this country and where an attachment of property is impossible.⁵⁹

[60] Thus, this is precisely where the factual dispute between the plaintiff and the defendant is narrowly located. The plaintiff's case is that the summons was served on the defendant locally and that no attachment of property in this country of any 'saleable value' was possible when the summons was served. The defendant disputes this. I now analyse some undisputed and disputed facts concerning the connecting factors that may or may not serve to tie the action to the forum in question. The plaintiff is an *incola* of this court. That was the case when the system was sold and implanted into her, and this remained so when the system's failure manifested.⁶⁰

[61] The delict that is the subject matter of these proceedings was committed within the territorial confines of the jurisdiction of this court. A local company supplied the system to the plaintiff.⁶¹

[62] The first operation to implant the system occurred at a local medical facility. When the system failed, the plaintiff was an *incola* of this court. Two further remedial procedures followed, which took place at local medical facilities. At common law, a court has jurisdiction in proceedings based on delict if it occurs or is committed in its jurisdiction.⁶²

[63] Thus, it is challenging to avoid the conclusion that this court is the forum with which the action has a fundamental and substantial connection. I say this because, in its essential features, the plaintiff's claim is a defective product claim in delict.⁶³

⁵⁹ This was conceded in the heads of argument filed on behalf of the defendant.

⁶⁰ The plaintiff was also an *incola* of this court when these proceedings commenced.

⁶¹ Orthomedics (Pty) Ltd was registered in Pinelands in the Republic of South Africa.

⁶² These facts are not disputed by the defendant.

⁶³ *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA).

[64] I say this also because the place or location of the commission of a delict in a product liability case is to be determined concerning where the harm was inflicted.⁶⁴

[65] The defendant advances that our jurisprudence dictates that there is no need to attach property when the summons was served on the foreign *peregrine* defendant in this country where an attachment of property is impossible.⁶⁵

[66] This argument advanced by the defendant bears more scrutiny. I say this because of the peculiar facts of this case. The plaintiff submits that no attachment of property of any 'saleable value' was possible when the summons was served on the defendant.⁶⁶

[67] It is common cause that when the summons was served, the defendant had some interests in two registered patents. Further, the patents were of nominal value (as agreed). As I understand the evidence, the defendant's interests in the two patents had no saleable value. Thus, any attachment by the plaintiff would have been meaningless and served no purpose.⁶⁷

[68] In connection with these interests in the registered patents, the defendant nominated local addresses for the two patents to be registered in its name. Thus, the defendant undoubtedly had a physical presence locally through its agents.⁶⁸

[69] Even if I am wrong in my interpretation and analysis of our current jurisprudence on this issue, the peculiar facts of this case dictate that the common law regarding jurisdiction needs to be developed. We live in a technology-driven society, and more global international businesses with no boundaries are being developed.⁶⁹

⁶⁴ Thomas v BMW South Africa (Pty) Ltd 1996 (2) SA 106 (C).

⁶⁵ As per the defendant's heads of argument (delivered on 23 November 2023) at paragraph 28.

⁶⁶ The summons was served in Cape Town during January 2014.

⁶⁷ Schmidt v Weaving 2009 (1) SA 170 (SCA) at paragraph 23.

⁶⁸ Lin and Another v Minister of Home Affairs and Others 2015 (4) SA 197 (GJ).

⁶⁹ Richman v Ben-Tovim 2007 (2) SA 283 (SCA) at paragraph 9.

[70] Thus, as a matter of pure logic, the common law should be adopted and adapted to modern customs and practices of international trade. In developing the common law, considerations of appropriateness and convenience may sufficiently dilute and erode the doctrine of effectiveness as pre-eminent in questions relating to jurisdiction over foreign defendants.⁷⁰

[71] The common law should be developed insofar as monetary claims against the defendant in this case are concerned. The peculiar facts of this case dictate that the common law regarding jurisdiction falls to be expanded and developed to benefit this plaintiff. Thus, the special plea on jurisdiction should fail.⁷¹

[72] I make the following order:

1. The special plea on jurisdiction is dismissed.
2. The defendant shall be liable for the costs of an incidental to the determination of the special plea on jurisdiction.
3. The costs shall be on the scale as between party and party and shall include the costs of two counsel (where so employed) on Scale C.

E D WILLE
CAPE TOWN

COURT APPEARANCES:

FOR AND ON BEHALF OF THE PLAINTIFF

⁷⁰ Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC 2019 JDR 1425 (GJ).

⁷¹ All the surrounding circumstances and facts are overwhelmingly to the benefit of the plaintiff.

S OLIVIER S.C. AND WITH HIM J ORD

INSTRUCTED BY

A BATCHELOR AND ASSOCIATES

FOR AND ON BEHALF OF THE DEFENDANT

B MANCA S.C.

INSTRUCTED BY

FASKEN INCORPORATED