

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **2022-027413**

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **NO**

DATE 27 June 2025

In the matter between:

BEFORE THE HONOURABLE JUSTICE, AUCAMP AJ

ABEDAIR AVIATION LIMITED

First Applicant

ADRIAN WILCOX

Second Applicant

And

NATIONAL AIRWAYS CORPORATION (PTY) LTD

Respondent

JUDGMENT

[1] The parties on 18 August 2011, concluded an Aircraft Lease Agreement, the first lease agreement, in terms of which the respondent agreed to lease to the first applicant an aircraft for contract leasing and charter operations to be conducted under the first applicant's Air Operators certificate in Kenya. For

present purposes the first lease agreement provided that (a) any and all disputes between the parties would be governed by the relevant and applicable South African laws, (b) any and all disputes would be adjudicated in the appropriate courts of law in South Africa and (c) the parties irrevocably submitted themselves to the jurisdiction of the relevant and applicable South African courts (***“the jurisdiction provisions”***).

[2] The first applicant failed to adhere to its payment obligations owing to the respondent in respect of the first lease agreement, more specifically as at 24 May 2013, the first applicant owed the respondent an amount of US\$ 204,421.08 consisting of arrear rental (US\$ 197,648.70) and interest (US\$ 3,898.19) (***“the first lease debt”***).

[3] At a subsequent meeting between the parties, the second applicant on behalf of the first respondent acknowledged the first applicant's indebtedness. The parties agreed that a new lease agreement would be concluded together with a settlement agreement and acknowledgement of debt (***“the first settlement agreement”***). The respondent in turn, agreed to pass a credit to the first applicant in the amount of US\$ 64,500, conditional upon (a) payment of the balance of the first lease debt in two instalments of US\$67,000 each, (b) all other arrears remain due and payable and (c) the conclusion of a new lease agreement (***“the second lease agreement”***).

[4] The intended settlement agreement and acknowledgement of debt, a written copy thereof, was not signed by the parties, however the second lease agreement was signed on 30 June 2013. As in the previous instance, the second lease agreement contained the jurisdiction provisions.

[5] The first applicant on 28 June 2013 paid an amount of US\$50,000 as part payment of the first instalment of US\$67,000 in respect of first lease debt. The applicants further agreed to settling the balance of the first lease debt and a further US\$17,00 was paid on 8 July 2013, leaving the balance of US\$ 67,000.

[6] The first applicant, therefore and in breach of the first settlement agreement failed to make payment of the second instalment of US\$67,000. Equally, and in breach of the second lease agreement, the first applicant failed to maintain the agreed upon rental instalments.

[7] The first applicant on 16 August 2013, admitted its indebtedness and offered to resolve the non-payment by having offered to purchase the aircraft. As at 30 May 2014, the first applicant owed the respondent US\$ 318,924.46. The respondent presented the first applicant with a first amendment to the second lease agreement together with a written acknowledgement of debt. Both the amendment and the acknowledgement of debt was not signed by the first applicant however a payment of US\$40,000 was made on 10 September 2014.

[8] The parties on 30 June 2015, concluded the second settlement agreement and acknowledgment of debt ("**the second settlement agreement**") recording that as at 1 June 2014 the first applicant's collective indebtedness calculated to an amount of US\$ 588,524,00. Simultaneously with the conclusion of the second settlement agreement, the second applicant bound himself as surety and co-principal debtor in respect of the first applicant's liabilities owing towards the respondent. As in the previous instances, both the second settlement agreement and the deed of suretyship contained the jurisdiction provisions.

[9] The first applicant on 27 August 2015 again re-affirmed the first applicant's indebtedness owing to the respondent and a sale agreement in respect of the aircraft was concluded on 18 November 2015. The actual sale was concluded on 14 March 2016.

[10] On 21 January 2016, the respondent confirmed that, taking into account the purchase price paid by the first applicant that the balance owing needed to be dealt with in terms of a further acknowledgement of debt. The balance owing to the respondent on 18 March 2016, calculated to an amount of US\$ 548,940.00. As in previous instances, the respondent offered to pass a credit in favour of the first applicant in the amount of USS 333,940.00, on condition that the amount of US\$ 215,000.00 was paid by the first applicant. A further settlement agreement

and acknowledgement of debt recording the amount of US\$ 215,000.00 was presented to the first applicant for signature on 22 August 2016, however it would seem that once the sale of the aircraft was concluded, the first applicant lost all interest in settling its indebtedness with the respondent. The referred to settlement agreement and acknowledgement of debt was not signed by and/or on behalf of the first applicant. Equally, the referred to amount was not paid, this notwithstanding subsequent undertakings made by the first respondent on 2 March 2017 and 27 July 2017.

[11] The respondent on 26 November 2018 obtained judgement by default against the first and second applicants, jointly and severally, in the following terms:

- (a) The deed of suretyship, a copy of which is annexed as FA28, to the applicant's founding affidavit is rectified by the deletion of the word "Debtor" and the substitution thereof with the word "Surety".
- (b) Judgement is granted against the first and second respondents jointly and severally, the one paying the other to be absolved as follows:
 - (i) payment of the amount of US\$ 215,000.00 or the South African Rand equivalent as at the date of payment;
 - (j) payment of US\$ 48,277.98 of the South African Rand equivalent as at the date of payment;
 - (k) interest on the amount of US\$ 215,000 as at the rate of 12% per annum from 2 October 2018 to date of payment; and
 - (l) costs of suit to the attorney and client scale.

(*"the judgement"*)

[12] The applicants make application for an order in the following terms:

- (a) It is declared that the judgement is a nullity, alternatively set aside.
- (b) In the alternative, the judgement is rescinded and the applicants are directed to file their answering affidavit(s) or notices in terms of rule 6(5)(d)(iii) of the Uniform Rules of Court, if so advised, to the respondent's application within a period of 15 days from date of this order.
- (c) Costs.

[13] The application is made with the advancement of legal grounds or points only. The applicants do not place any fact, material to this application, in dispute and instead adopted the approach that even on the respondent's version, as presented to Modiba J on 26 November 2018, that there were several legal challenges or flaws to the respondent's case, and as such that the relief claimed should be granted. The applicants did not challenge any of the material factual allegations contained in the founding affidavit of the respondent.

[14] The application is premised on the trite principle that a judgment granted by a court lacking in jurisdiction to have received the application and grant the judgement, constitutes a nullity, and does not require to be set aside. Alternatively, the applicants approach this court, on the same facts, to rescind the judgement in terms of Rule 42(1)(a) alternatively in the common law. Consequently, this court does not concern itself with considering a *bona fide* defence.

[15] The issues for consideration therefore are:

- (a) the jurisdiction or lack thereof of the court *a quo*; and
- (b) whether the rectification of the deed of suretyship concerning the second applicant was legally competent.

[16] The applicants, also raised issues of prescription and the court *a quo* having received inadmissible evidence in that the confirmatory affidavits of certain key witnesses of the respondent, were allegedly not presented to court. These issues were not seriously pursued, both in the applicants' heads of argument as well as during the argument itself, however, from the papers it is clear that there are no merits to these grounds. Instead, the issues for consideration are those listed in 15.1 and 15.2 above.

JURISDICTION

[17] The application is primarily brought on the grounds that the court having granted the judgement, lacked the requisite jurisdiction in that the applicants (a) having been *peregrini* before Modiba J and (b) the applicants not having had any moveable or immovable property in South African that is capable of attachment to

found jurisdiction. This state of affairs appear to be common cause between the parties.

[18] The applicant in its founding papers before Modiba J, provided the court with an extensive and detailed account of the relationships between the parties, the various discussions and/or meetings and the agreements subsequently, concluded flowing from the said exchanges. The founding affidavit, for present purposes under the heading: "PURPOSE OF THIS APPLICATION", provides a summary of the respondent's case, i.e paragraphs 7.1 to 7.13. The section thereafter is followed, under the heading "JURISDICTION" by certain allegations relating to the jurisdiction of the court. In paragraph 11 of the respondent's founding affidavit, the respondent purports to place reliance on the second settlement agreement and the first suretyship to establish jurisdiction. The applicants in this application suggest that the respondent in answer to this application attempts to establish a ground different to the one relied upon before Modiba J.

[19] I don't believe that the applicants are correct in their assessment of the respondent's case, however, for the reasons advanced herein, I am not convinced that anything turns on the objection raised by the applicants.

[20] The resolution of this issue, is to be found in the respondent's cause of action. The applicants seek to confine the cause of action to the settlement agreement and the first deed of suretyship. I have some sympathy for the approach adopted by the applicants. The founding affidavit contains some rather clumsy allegations which in isolation can be interpreted to have a completely different meaning to when one considers the meaning with reference to the entire founding affidavit. That being said, on my reading of the founding affidavit, the respondent's cause of action is one of arrear rentals and ancillary charges. These amounts originate from the various lease agreements and not from settlement agreements and/or acknowledgement of debt documents. The latter documents merely serve as evidence to establish the indebtedness, but not the cause of action.

[21] The arrear rentals effectively are detailed in a series of events, commencing with the conclusion of the first lease agreement and ultimately culminating in the conclusion of the sale of the aircraft, the second settlement agreement and the deed of suretyship. The first applicant effectively had a running account with the respondent.

[22] The establishment of respondent's cause of action is relevant for present purposes as the court's jurisdiction should be determined with reference to the cause of action and not on an isolated clumsy allegation, which if read against the entire affidavit, is clearly demonstrated to be inaccurate.

[23] Jurisdiction is determined with reference to the allegations in the pleadings and not by the substantive merits of the case.¹ In paragraph 110 of the respondent's founding affidavit, it is alleged that:

“In terms of the various Agreements mentioned above and taking into consideration the Aircraft Sale Agreement, the arrear amount due and owing to the Applicant by the first respondent is US\$ 215,000. This amount is due, owing and payable by the first respondent in terms of the Second Settlement Agreement and due, owing and payable by the Second Respondent to the Applicant in terms of the Deed of Suretyship.”

[24] Equally, it is to be noted that the settlement agreement, does not provide for any form of novation.

[25] A lessor claiming arrear rental must allege (a) the contract, (b) fulfilment of the lessor's duties, and (c) non-payment of rent.²

[26] It is common cause that both the second settlement agreement and the deed of suretyship contain the jurisdiction provisions. Equally, both the second settlement agreement and the deed of suretyship, provide for the appointment by the applicants of a “Process Agent”, in South Africa, more specifically, with an

¹ Gcaba v Minister for Safety and Security 2010 (1) BCLR 35 (CC); 2010 (1) SA 328 (CC) para 75

² Harms, Amler's Precedent of Pleadings, Ninth Edition, Page 236

address (chosen domicilium) within the jurisdiction of this court. The parties further expressly agreed that the purpose of the appointment of the process agent is to allow for service of *inter alia* of all process on him / her on behalf of the first and second applicants.

[27] South African courts derive personal jurisdiction primarily from common law principles, as the statutory provisions, section 21 of the Superior Courts Act 10 of 2013, (***the Act***)³ is deliberately non-exhaustive. Under common law, a South African High Court normally acquires jurisdiction over a *peregrinus* (a foreign person or entity with no domicile or property in South Africa) only by effectiveness: traditionally by arresting the person or attaching local assets to found jurisdiction. The rationale is to ensure any judgment can be effectively enforced.⁴ In ***Ewing McDonald & Co Ltd v M&M Products Co***,⁵ for example, the court held that a High Court could only take cognizance of a foreign defendant if arrest or attachment took place.

[28] However, since ***Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)***,⁶ the common law has been developed to relax this rule when arrest/attachment is impractical. In *Bid International Holdings, supra*, the Supreme Court of Appeal, (***the SCA***), held that requiring arrest of a foreign defendant was unconstitutional and should be replaced by practical expedients. Where attachment is possible, it still remains available, but where it is not, jurisdiction is acquired by serving the foreign defendant within South Africa *and* ensuring a sufficient nexus between the dispute and the court's territory. As Howie J put it: "*it will suffice to empower the court to take cognizance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court*

³ Section 21 of the Act provides that "A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, ..."

⁴ *Gross v DM* (2021/43212) [2024] ZAGPJHC 767; 2025 (2) SA 172 (GJ) (6 August 2024)

⁵ 1991 (1) SA 252 (A)

⁶ 2008 (3) SA 355 (SCA)

concerned”.⁷ The “*strongest connection*” is often that the cause of action arose within the court’s jurisdiction.⁸

[29] As a consequence, absent statutory exception, jurisdiction over a *peregrine* requires either a traditional ground (*domicile, incola status, or connection through contract/performance in South Africa*) or a practical expedient i.e in-person service or consent by the defendant.⁹ If neither exists, the court lacks jurisdiction. The underlying policy – the doctrine of effectiveness – remains that any judgment must have a realistic prospect of enforcement.¹⁰

[30] Parties to a contract may include a choice-of-law clause (e.g. “**South African law applies**”) and a forum-selection or jurisdiction clause (“**all disputes to be adjudicated in South African courts; the parties submit to South African jurisdiction**”). Such clauses are generally valid as agreements on procedural matters. South African courts will give effect to a clear contractual submission to their jurisdiction, but subject to the constitutional/public-policy principle that jurisdiction cannot be entirely ousted.¹¹

[31] In practice, a jurisdiction clause is treated as evidence of consent – a *prorogation of jurisdiction* – but it does not by itself automatically oust other jurisdictional rules. If the clause designates South African courts, it constitutes the defendant’s agreement to be sued in South Africa. But for jurisdiction to be vested, the court must still satisfy the same competence requirements (*residence/service/performance*). Also, where a foreign defendant explicitly or tacitly agrees, the court considers that consent in addition to any statutory or common-law ground.

[32] A jurisdiction clause alone cannot establish personal jurisdiction over a foreign defendant with no presence or assets in South Africa. In **Veneta Mineraria**

⁷ At [56]

⁸ Gross v DM *supra*

⁹ Bid Industrial Holdings *supra*

¹⁰ Gros v DM *supra*

¹¹ Bid Industrial Holdings *supra*

Spa v Carolina Collieries (Pty) Ltd (In Liquidation),¹² both plaintiff and defendant were *peregrini* and the court held that mere submission (“**prorogation**”) did not suffice: One or more of the traditional grounds of jurisdiction must also be present. In other words, where a foreign defendant consents but no legal link exists (*no residence, no assets, no local performance*), the consent alone cannot clothe the court with competence.

[33] This principle has been repeatedly affirmed. In ***Jamieson v Sabingo***¹³ a defendant who formally consented to jurisdiction after summons had been served was held sufficient basis for jurisdiction because the plaintiff was *incola* (resident) in South Africa. The SCA noted that *Veneta*’s rule “while wide enough to cover cases where the plaintiff was an *incola*, was not intended to extend to cases where a peregrine defendant consents to the jurisdiction of the court of which the plaintiff is an *incola*”. Thus, submission by itself did confer jurisdiction in ***American Flag plc v Great African T-Shirt Corporation CC; Amrican Flag plc v Great African T-Shirt Corporation CC; In re Ex parte Great African T-Shirt Corporation CC***¹⁴ as applied in ***Hay Management Consultants Ltd v P3 Management Consultants (Pty) Ltd***¹⁵ when the plaintiff was South African, even if the foreign defendant had no assets to attach.

[34] However, where *both* parties are *peregrini*, as in purely international disputes, courts have held that consent alone is not enough absent a jurisdictional nexus. The SCA recently affirmed this in ***Ingosstrakh v Global Aviation Aviation Investments (Pty) Ltd and Others***.¹⁶ In *Ingosstrakh*, a British insurer (defendant) and a German plaintiff were both foreign; the insurer’s policy expressly selected South African law and court. The insurer argued that submission was insufficient because both parties were *peregrini*. The SCA observed that under *Veneta* a peregrine defendant’s submission alone “did not suffice to clothe [a] court... with jurisdiction” absent other grounds. Importantly, *Ingosstrakh* held that submission by a foreign defendant *plus* a meaningful

¹² 1987 (4) SA 883 (A)

¹³ 2002 (4) SA 49 (SCA)

¹⁴ 2000 (1) SA 356 (W)

¹⁵ (439/2003) [2004] ZASCA 116; [2205] 3 All SA 119 (SCA); 2005 (2) SA 522 (SCA) (30 November 2004)

¹⁶ (934/2019) [2021] ZASCA 69; [2021] 3 All SA 316 (SCA); 2021 (6) SA 352 (SCA) (4 June 2021)

jurisdictional link, i.e that the insurance contract was concluded in Johannesburg was sufficient to assume jurisdiction.

[35] Mr Tshikila, counsel for the applicants, argues that the purported submission to “courts” in South Africa, with reference to *Veneta supra*, is insufficient to establish jurisdiction in respect of a specific court. The submission is correct, however it fails to take into account the further dicta expressed in *Veneta supra*, relating to the further connecting jurisdictional factors, i.e that the respondent is an *incola* to the jurisdiction of this court and / or the appointment of the process agent, establishing a chosen domicile *citandi et executandi* within the jurisdiction of this court. In any event, Mr Hollander for the respondent, correctly submits that the appointment of a chosen *domicilium citandi et executandi* address within a particular jurisdiction, is sufficient to confirm jurisdiction on that court.¹⁷

[36] Consequently, and on the common cause grounds, alternatively grounds that are not disputed, the respondent established that the applicants had consented to the South African jurisdiction.

RECTIFICATION

[37] The deed of suretyship, *inter alia* provides as follows:

“Made by and between

ADRIAN WILCOX

A major Male, Director of the Debtor UK Passport Number 5[...] and currently residing at Plot 214/792, Naivasha Avenue, Muthaiga, Nairobi, KENYA.

(Hereinafter referred to as “the Surety”)

And

NATIONAL AIRWAYS CORPORATION (PTY) LIMITED

...

¹⁷ See for example: Ex Parte Hay Management Consultants (Pty) Ltd 2000 (3) SA 501 (W) at 508E-I; 511H - J

I, ADRIAN WILCOX, a major male, Director of the Principal Debtor, currently residing at residing (sic) at Plot 214/792 **(Hereinafter referred to as “the Surety”)**

Hereby bind myself, in favour of National Airways Corporation (Pty) Ltd, a company of limited liability duly incorporated as such, under registration number 1945/019919/07 according to the laws of the Republic of South Africa situated at ... as surety and co-principal debtor for the due and punctual performance of all amounts which

ABEDAIR AVIATION LIMITED, a company duly incorporated as such....
(Hereinafter referred to as “the Principal Debtor”)

SIGNED at LANSERIA INTERNATIONAL AIRPORT ON 30 June 2015

For and on behalf of

NATIONAL AIRWAYS CORPORATION (PTY) LTD

Signature

WITNESS _____

Name of Signatory

Designation of Signatory

SIGNED at NAIROBI on 30 June 2015

ADRIAN WILCOX

WITNESS _____

Signature

Name of Signatory

Designation of Signatory”¹⁸

[38] The respondent applied and obtained an order rectifying clause 10.7 of the deed of suretyship, which provides:

¹⁸ The actual signatures do not appear from the extracted portion of the deed of suretyship and quoted above. Save to state that the deed of suretyship was signed on behalf of the respondent by a certain JP Fourie, in his capacity as Executive Director of the respondent and in respect of the purported surety, by the second applicant, in his purported capacity as Chief Executive Officer of the first applicant.

“Process Agent The **Debtor** shall agrees (sic) to maintain an agent for service of process in Johannesburg South Africa. Such agent in Johannesburg shall be, currently situated at Rosebank Law Chambers, 4 Glenhove Road, Melrose Estate Johannesburg, 2196.... And any writ, judgement or other notice of legal process shall be sufficiently served on the **Debtor** if delivered to such agent at its address for the time being. **Debtor** undertakes not to revoke the authority to the above agent but of for any reason, such agent no longer serves as agent of **Debtor** to receive service of process. **Debtor** shall immediately appoint another agent and advise NAC thereof.”

[39] The applicants, argue that the deed of suretyship is *void ab initio* on account of the fact that it fails to comply with section 6 of the General Law Amendment Act, Act 50 of 1956. The conclusion is founded, firstly, on the fact that the second applicant, Adrian Wilcox, signed the deed of suretyship, *ex facie* the deed of suretyship, in his representative capacity as Chief Executive Officer of the first applicant. Secondly, the applicants rely on the respondent’s allegations contain in its founding affidavit, more specifically, paragraphs 69 to 70 thereof in terms of which the intended rectification is motivated.

[40] Section 6 of the General Law Amendment Act, Act 50 of 1956 provides that the terms of the deed of suretyship must be embodied in a written document signed by and on behalf of the surety. The document must further identify the creditor, the surety and the principal debtor.

[41] *Ex facie* the document, I am unable to conclude that the deed of suretyship does not comply with the relevant provisions of the General Law Amendment Act, Act 50 of 1956. There is no dispute that annexure FA28 to the respondent’s founding affidavit constitutes a written document containing the terms and conditions of the intended deed of suretyship. The creditor, the principal debtor and the debtor are all clearly identified in the said annexure. The only bone of contention remaining as far as the applicants are concerned is the description of the second applicant when he appended his signature to the deed of suretyship, i.e. Chief Executive Officer. It is not denied that the signature is indeed that of the

second applicant. As a consequence, I am of the view that the deed of suretyship was signed by and on behalf of the second applicant as surety. It equally follows that the deed of suretyship fully complies with the relevant provisions of the General Law Amendment Act, Act 50 of 1956.

[42] To accept the applicants' submissions on this issue would require of me to disregard the express provisions of the deed of suretyship as well as the fact that the first applicant, in the settlement agreement had already appointed an agent. On the applicants' version, the first applicant, in terms of deed of suretyship bound itself to the respondent as surety and co-principal debtor, in respect of its own debt, an impossibility even on the version and correctly so, of the applicants. The conclusions which the applicant seek this court to make, seems to me a bridge too far to cross.

[43] A suretyship agreement may be rectified if it otherwise complies with the statutory requirements.¹⁹

RELIEF

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

- (a) The application is dismissed.
- (b) The applicants, jointly and severally, the one paying, the other to be absolved, are ordered to pay the respondent's costs, such costs to be taxed on the attorney and client scale.

S AUCAMP
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be **10h00 on-27 June 2025***

¹⁹ Intercontinental Exports (Pty) Ltd v Fowles [1999] 2 All SA 304 (A); 1999 (2) SA 1045 (SCA); Tesven CC v SA Bank of Athens [1999] 4 All SA 396 (A), 2000 (1) SA 268 (SC)

HEARD ON: 14 March 2025

DATE OF JUDGEMENT: 27 June 2025

For the Applicants: Adv Tshikila
Fairbridges Wertheim Becker

For the Respondents: Adv L Hollander
Darryl Furman & Associates