THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
CASE NO 615/06

In the matter between

BID INDUSTRIAL HOLDINGS (PTY) LTD **Appellant**

and

JOHN FRANCIS RODERICK STRANG **First Respondent**
ANDREW JOHN DONALD STRANG **Second Respondent**

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Third Party**

CORAM: **HOWIE P, NUGENT, PONNAN, MAYA JJA et MALAN AJA**

Date Heard: **27 August 2007**

Delivered: **23 November 2007**

Summary: **Arrest to found or confirm jurisdiction held to be unconstitutional. The common law developed by abolition of the requirement of arrest to found or confirm jurisdiction. Jurisdiction capable of being established on other bases without arrest and also without attachment where no attachable property.**

Citation: This judgment may be referred to as *Bid Industrial Holdings v Strang* [2007] SCA 144 (RSA)

HOWIE P

HOWIE P

[1] The appellant is a South African company. Its registered office is in Johannesburg.

[2] The two respondents, John and Andrew Strang, are citizens of Australia. They are resident and domiciled in that country. Two of their eponymous Australian companies have extensive Southern African interests. They are directors of those companies.

[3] The appellant intends to sue the respondents in the Johannesburg High Court for delictual damages. To establish or confirm that Court's jurisdiction for the purposes of the suit the appellant applied for an order for the respondents' arrest.

[4] The respondents opposed the application. It is only necessary to state their two main grounds. The first was that no *prima facie* case on the merits of the proposed claim was made out on the papers. The second was that foreign nationals while in South Africa enjoyed the protection of the Constitution and their arrest to found or confirm jurisdiction would be contrary, to various provisions of the Bill of Rights. Therefore the

legislation which, it was said, empowered such an arrest[1] was unconstitutional. Further, because the legislation derived from a common-law rule, the common law had to be developed so as to abolish the rule.

[5] In view of the constitutional challenge the Minister of Justice and Constitutional Development was joined in the proceedings. In the submission of the Minister the legislation concerned was not unconstitutional and in any event did not empower the arrest of foreign nationals who were outside the country when the order sanctioning their arrest was granted. (The respondents visit South Africa fairly frequently on business but were not within the country at any time relevant to the application.)

[6] The application came before Trengove AJ in the High Court at Johannesburg. The learned judge dismissed it for want of a *prima facie* case, it being a requirement for the success of an application for jurisdictional arrest that an applicant present a case at least *prima facie* established. In taking that approach the court below applied the principle laid down in *S v Mhlungu*[2] that where it is possible to decide a case without reaching a

[1] Section 19(1)(c) of the Supreme Court Act 59 of 1959.
[2] 1995 (3) SA 867 (CC) para 59.

constitutional issue that is the course to be followed. The learned Judge granted the plaintiff leave for the present appeal.

[7] As the Court below observed, the *Mhlungu* principle does not amount to an inflexible rule. A number of considerations lead me not to apply it.

[8] The first is this. A draft of the intended delictual claim is annexed to the application papers. It details at some length allegations of a contractually enforceable joint venture partnership between the appellant and the two Strang companies that have Southern African interests. The proposed particulars of claim then go on to allege (a) that the Strang companies 'in bad faith' committed breaches of their contractual obligations to the appellant in terms of the partnership; (b) that the respondents 'intentionally and unlawfully' procured the breaches, thereby intentionally and unlawfully interfering with the appellant's contractual rights; and (c) that the respondents 'intentionally and unlawfully diverted the profits' of the partnership that were due to the appellant to the two Strang companies for the latter's exclusive benefit and thereafter to a third Strang company, ultimately for their own personal benefit.

[9] On the basis of the allegations I have summarised as (a), (b) and (c) it is proposed to allege that the respondents are delictually liable, jointly and severally with their contractually liable companies, for the appellant's damages comprising its loss of the diverted profits. The damages claimed amount to R31 206 000.

[10] In the Court below lead counsel for the appellant (who did not appear on appeal) is recorded by the learned Judge as having identified 'the real claim' against the respondents as based on their wrongful and intentional interference with the appellant's contractual rights. (This is effectively encompassed by the allegations summarised above as (b)). Accordingly the court considered that it was on that basis that the claim was to be judged in order to determine whether it disclosed delictual conduct, more particularly wrongful conduct. (If it did not, then the appellant will obviously have failed to establish an actionable claim at all, not merely on a *prima facie* basis.)

[11] The gist of the learned Judge's finding adverse to the appellant on its thus identified 'real claim' was that to fix directors with delictual liability for a breach of contract which they commit on their companies' behalf would 'significantly erode' the law's recognition of a company's separate legal personality which had, on established authority, to be upheld 'except in the

most unusual circumstances'.[3] Moreover the known delict of interference with contractual relations was a wrong committed by an outsider to the contract, not by one of the contracting parties. Finally, there was no need to accord a delictual claim where the victim of the breached contract already had a claim in contract. It followed, in the view of the Court below, that the alleged conduct central to the proposed delictual claim was not wrongful.

[12] During argument before us counsel for the appellant contended that in confining the basis of the delictual claim to wrongful interference with contractual relations the court below overlooked the thrust of the allegations summarised in (a) and (c) above. Essentially, so it was argued, the respondents were alleged to have acted as strangers to their companies, not as directors on behalf of the companies. In addition, their alleged wrongful procurement of the breaches and diversion of the profits effectively meant that the respondents were guilty of misappropriation. In the circumstances outlined in the draft claim, therefore, the companies were merely the vehicles for the respondents' conduct, which conduct was wrongful and clearly enough alleged as such.

[3] *Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA) para 20. Also see *The Shipping Corporation of India v Evdomon Corporation* 1994 (1) SA 550 (A) 566; *Cape Pacific v Lubner Controlling Investments* 1995 (4) SA 790 (A) 803 to 804.

[13] In my view it is unnecessary to go into more detailed discussion as to whether a *prima facie* case was made out. If the Judge were upheld it would not require much amendment to the proposed claim to bring it in line with what the appellant's counsel said the claim was intended, and can be made, to allege. In that event the matter would in all probability be back in the courts and the constitutional issue would arise again. (Obviously were the Judge held to have been wrong the constitutional issue would require resolution in any case.)

[14] In the second place *Mhlungu* was decided when this Court had no constitutional jurisdiction. Accordingly attention was not given to the input which this court might be able to make on a constitutional issue were such jurisdiction one day to exist.

[15] Thirdly, as reported decisions of the Constitutional Court since *Mhlungu* show, the lines previously regarded as demarcating a constitutional issue have become substantially blurred. Cases have been admitted to adjudication in that court where it has been considered in the interests of justice to do so rather than strictly because of their involving a 'constitutional issue' as that term was understood at the time of *Mhlungu*.

And even that term has been given a broader application, if not a broader meaning, than then.

[16] Finally, the reach of the constitutional issue extends to the many other cases involving resident plaintiffs suing foreign defendants. It is therefore necessary to resolve it as a matter of practice and principle and not just for purposes of the present litigation.

[17] I accordingly leave the issue determined by the learned Judge undecided.

[18] Turning to the constitutionality of jurisdictional arrest, I should mention at the outset that although an asset belonging to one of the respondents was at one time capable of being attached to found or confirm jurisdiction the appellant failed to take the opportunity to effect such attachment. In addition, although the appellant has persistently requested the respondents to submit to the Johannesburg High Court's jurisdiction they have refused to do so.

[19] As already indicated, the legislative provision said by the respondents to be unconstitutional is s 19(1)(c) of the Supreme Court Act 59 of 1959. Section 19 is headed:

‘Persons over whom and matters in relation to which provincial and local divisions have jurisdiction.’

(Now one refers to a High Court rather than a division and I shall do so in what follows. Paragraph (c) actually uses the term ‘High Court’). The relevant parts of s 19(1) read:

‘(a) A [High Court] shall have jurisdiction over all persons residing or being in and in relation to all causes arising … within its area of jurisdiction and all other matters of which it may according to law take cognisance ...

(b) …

(c) Subject to the provisions of section 28 … any High Court may –

(i) issue an order for attachment of property or arrest of a person to confirm jurisdiction … also where the property or person concerned is outside its area of jurisdiction but within the Republic: Provided that the cause of action arose within its area of jurisdiction; and

(ii) where the plaintiff is resident or domiciled within its area of jurisdiction, but the cause of action arose outside its area of jurisdiction and the property or person concerned is outside its area of jurisdiction, issue an order for attachment of property or arrest of a person to found jurisdiction regardless of where in the Republic the property or person is situated.’ (Sic)

(Paragraph (c) was added in 1998.[4] Section 28 prohibits arrest of a defendant who is a South African resident.)

[20] The record does not reveal where the appellant's alleged delictual cause of action arose and counsel for the appellant were unable to tell us. We were, however, informed that there were some factual connections with South Africa, and the Johannesburg High Court's area of jurisdiction in particular. We therefore have to consider the constitutionality of jurisdictional arrest whether aimed at founding or merely confirming jurisdiction.

[21] In contending that the requested arrest could not infringe constitutional rights counsel for the appellant urged that arrest would involve no physical restraint and certainly not detention in custody. According to the argument, apart from informing the arrestee of the arrest, the most that would be physically involved was, in effect, a tap on the shoulder. In other words, the arrest would have no greater significance than mere symbolism.

[22] For the Minister it was submitted that s 19(1)(c) aimed to facilitate a resident plaintiff's forensic access under s 34 of the Constitution and that the court in any event had a discretion by means of the exercise of which the

[4] See s 6 Act 122 of 1998.

competing rights of plaintiff and defendant (the latter having the opportunity to oppose such an application) could be appropriately balanced. In addition, s 19(1)(c) spoke of arrest only, not detention.

[23] For the respondents it was argued that in so far as the common law required an arrest to found or confirm jurisdiction and the statute enabled it, the common law had to be developed by doing away with the requirement and the statute had to be declared invalid in so far as it enabled the requirement's fulfilment. Such an arrest infringed a range of constitutionally entrenched rights[5] and neither the common-law rule nor the statute could be saved by a limitations enquiry in terms of s 36 of the Constitution.[6] Specifically the challenged phrases in s 19(1)(c) are 'or arrest of a person' and 'or person' where they respectively appear in paragraphs (i) and (ii) .

[24] Essentially a court has jurisdiction over a matter if it has the power not only if taking cognisance of the suit but also of giving effect to its

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[5] The right to equality before the law (s 9(1) of the Constitution); the guarantee against unfair discrimination s 9(3); the right to human dignity (s 10); the right to freedom of movement (s 21); and the right to a fair civil trial (s 34).

[6] Section 36(1) of the Constitution provides:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.'

judgment.[7] However it is necessary at the start of the discussion to recognise that the issue here is whether jurisdictional arrest is constitutional. We are not concerned with the question of jurisdictional effectiveness as such. Were the focus on attachment, not arrest, we would be concerned squarely with effectiveness. Dealing as we are with arrest, effectiveness – and taking cognisance of the suit – enter the picture only in so far as we are concerned to assess whether jurisdictional arrest serves, or can possibly serve, any constitutionally permissible purpose in either respect.

[25] A court has the power to take cognisance of the suit if the relevant cause arises in its area of jurisdiction. The cause arises there if it would have done so at common law. At common law even if a jurisdictional cause (for example, contract or delict within the jurisdiction) was present, if the defendant was a foreigner there had to be arrest or attachment.[8]

[26] Contrary to the rule which prevailed in the Roman Empire that foreign defendants had to be sued in the courts of their own domicile, the practice in Holland and several other Dutch provinces allowed resident plaintiffs to arrest foreign nationals and to bring them before a local court in order to compel them to give security for their appearance in court or to pay

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[7] *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation)* 1987 (4) SA 883 (A) at 893F; *Ewing MacDonald & Co Ltd v M&M Products Co* 1991 (1) SA 252 (A) at 260C-D.

[8] *Ewing McDonald*, supra, at 260D-F.

whatever the judgment debt might be. This saved the plaintiffs the expense of proceeding in a foreign country; they could obtain judgment and levy execution in their own domicile.[9]

[27] Summarising the position in Holland, this court has said, speaking of attachment:

'the attachment … served to found jurisdiction and thereby enabled the Court to pronounce a not altogether ineffective judgment'.[10] (My emphasis.)

In the same case, after reviewing the relevant South African cases, the conclusion was expressed:[11]

'Ever since the time that the practice of arrest *ad fundandam jurisdictionem* was introduced into Holland it had some purpose and was never a mere symbolic act. If the value of the property attached be not related in any way to the judgment in the action, such an attachment would be a mere symbolic act and utterly purposeless. It is unlikely that, if the original purpose as it existed in Holland in the very early times ceased to exist and an attachment therefore ceased to serve any purpose, our Courts would still have persisted with this practice. It appears to me that the only reason why our Courts still require an attachment to found jurisdiction is to enable the Court to give a judgment

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[9] JWW (Sir John Wessels) '*History of our Law of Arrest to Found Jurisdiction'* (1907) 24 SALJ 390 at 393, 400 and *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) para 5. (Many writers and judgments use the terms *incola* and *peregrinus. Incola* usually meant domiciled resident but could include a domiciled foreigner. *Peregrinus* meant a true foreigner. However in South Africa, with its different provincial jurisdictions, *peregrinus* can also mean a South African citizen who is domiciled in one province and so a foreigner in another. In our case the appellant is an *incola* and the respondents are *peregrini* in the true sense.)
And see: *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries* 1969 (2) SA (A) 295 at 305C-D.

[10] *Thermo Radiant at* 306H-307A.

[11] At 310A-B.

which has some effect even though ultimately the judgment may in many cases only be partially satisfied and the "effectiveness" of the judgment fictional to the extent that it is not satisfied.'

[28] Although these statements were made in a minority judgment nothing in the majority judgment (based on a different point) conflicts with them. A later, unanimous, decision of this Court has expressed approval of the legal conclusions in the minority judgment as to effectiveness.[12]

[29] On the basis of the conclusion in *Thermo Radiant* the crucial jurisdictional purpose of attachment and arrest in Holland was to enable an effective judgment. Plainly, if there was no effective judgment or security to be obtained by, or following upon, attachment or arrest then no jurisdiction could be established. And if, then as now, an attachment or arrest were merely empty symbolism there would be no basis on which it could found jurisdiction.

[30] The common law came to deal with attachment of property and arrest of the person in the same breath. As applied in South Africa it requires that one or the other has to take place to found or confirm jurisdiction where the

[12] *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd*, supra, at 888E-F.

defendant is a foreign national.[13] Neither can take place without the plaintiff first obtaining an order for attachment or arrest and to secure such an order the plaintiff must, as I have said, make out a *prima facie* case. (One should perhaps emphasise for present purposes that arrest can follow upon no more than a *prima facie* case, in other words taking only the plaintiff's allegations into account.)

[31] The provision in section 19(1)(c), enabling an attachment or arrest order to be given in respect of property or persons wherever in the country they are (not just in the issuing court's area of territorial jurisdiction), eschews any implication that attachment or arrest is essential; it says the court 'may', not 'must', issue the relevant order. I shall revert to the meaning and function of the provision later.

[32] The first question to be answered now is whether arrest infringes the entrenched right to freedom and security of the person.[14]

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[13] *Ewing McDonald*, supra, at 258E-259C.

[14] Section 12(1) of the Constitution reads:

'Every one has the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in cruel, inhuman or degrading way.'

[33] I have mentioned that arrest would, in the submission of the appellant, involve no more than a symbolic act. Counsel went on to contend that an arrested defendant could in any case secure prompt release by consenting to jurisdiction, offering security or even making payment in whole or in part.

[34] Strenuously as the appellant's counsel shied away from the respondents' proposition that jurisdictional arrest entailed a serious deprivation of a defendant's liberty, the inescapable truth, in fact and in law, is that lawful arrest only ceases if there is a lawful reason for cessation and that between those moments in time the arrestee's liberty is inevitably restricted.

[35] It is beside the point whether a defendant can secure release by providing security or payment.[15] The present question has to be approached on the basis that there is no legal obligation on a foreign defendant to consent to jurisdiction or to provide a monetary basis whereby to avoid arrest or its consequence. That consequence can only be detention.

[36] Although s 19(1)(c) does not refer to detention, the process of arrest is always to engage the relevant agencies of the State to effect the arrest and

[15] Assuming jurisdictional arrest to be constitutional, it would cease, among other reasons, as the appellant indeed argued, on provision of security or payment: *Preisig v Tattersall* 1982 (3) SA 1082 (C) at 1083D.

then to restrict the arrestee's freedom pending attainment of some lawful purpose. If, for example, that purpose is not attained on the day of the arrest, the arrestee must necessarily remain in detention by the State until it is attained. Such detention can ordinarily only be in a prison.[16] Jurisdictional arrest, therefore, unquestionably aims to limit the arrestee's liberty.

[37] The constitutional right under consideration is only infringed if there is an absence of 'just cause' and a 'fair trial'. There is obviously no question here of a trial so the focus is on 'just cause'.

[38] In assessing whether establishing jurisdiction for purposes of a civil claim can be 'just cause' it is necessary, first, to consider whether arresting the defendant can enable the giving of an effective judgment. There is a crucial difference between attaching property and arresting a person. Attachment ordinarily involves no infringement of constitutional rights (absent, for example, seizure of the means by which the defendant's livelihood is earned). But, more importantly, the property attached will, unless essentially worthless, obviously provide some measure of security or some prospect of successful execution. Arrest, purely by itself, achieves neither. Security or payment will only be forthcoming if the defendant

[16] Cf *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W).

chooses to offer one or other in order to avoid arrest and ensure liberty. It is therefore not the arrest which might render any subsequent judgment effective but the defendant's coerced response.

[39] The impotence of an arrest itself to bring about effectiveness is illustrated by the result that would ensue were the arrested defendant to do nothing either before, or in answer to, judgment for the plaintiff. Pending judgment there is no legal mechanism to enforce security or payment and failure to pay the judgment debt does not expose the defendant to civil imprisonment.[17] Consequently, deprivation of liberty does not of itself serve to attain effectiveness.

[40] Furthermore the statements in *Thermo Radiant*[18] that the practice of jurisdictional attachment can have no justifiable foundation if that attachment is purely symbolic, apply with equal force were the proposed arrest in truth merely symbolic (as protested by the appellant).

[41] Apart from the fact that arrest does not serve to attain jurisdictional effectiveness it cannot be 'just cause' to coerce security or, more especially payment, from a defendant who does not owe what is claimed or who, at

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[17] See *Coetzee v Government of the RSA, Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC). Although decided under s 11(1) of the Interim Constitution, the decision applies equally to s 12(1) of the Constitution.

[18] Para 27 supra.

least, is entitled to the opportunity to raise non-liability in the proposed trial. If there is no legal justification for incarcerating a defendant who has been found civilly liable there cannot be any for putting a defendant in prison whose liability has not yet been proved. And as to the function of arrest to enable the court to take cognisance of the suit, that could be appropriately achieved if the defendant were in this country when served with the summons and there were, in addition, significant factual links between the suit and South Africa. I shall return to that aspect in due course. Accordingly, there is no 'just cause' for the arrests sought.

[42] Although it may be said that establishing jurisdiction is a constitutionally permissible objective, to reach it by means of deprivation of a foreign defendant's liberty is to breach the latter's s 12 entrenched right.

[43] The most obvious concomitant would be breach of the defendant's respective rights to equality, human dignity and freedom of movement. There is also much to be said for the contention that arrest would also compromise the right under s 34 of the Constitution to a fair civil trial.[19] Although it is arguable that, subject to the constraints imposed by all the

[19] Section 34 reads:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum .'

mentioned rights infringements, a detained defendant could still be permitted all required opportunities to consult, give instructions and attend court, it would seem unfair to have to litigate, unlike the plaintiff, under such handicaps. Suffice it, at all events, to say that jurisdictional arrest would cause extensive infringement of various of the defendant's fundamental constitutional rights. That bears heavily on the next question.

[44] That question is whether the common-law rule, being law of general application, can, in the respects in which it has been challenged, satisfy the limitation requirements of s 36 of the Constitution.

[45] The limitation imposed by the section in so far as it permits jurisdictional arrest strikes at those rights in particular which the Constitution is at pains to highlight – human dignity, equality and freedom.[20] As I have just indicated, the infringement is profound. The governmental purpose of the limitation is to favour resident plaintiffs, in line with the common law, by seeking to enable them to establish jurisdiction which would not otherwise exist and so avoid the trouble and expense of suing abroad. Assuming, for the moment, that purpose to be constitutionally permissible, I fail to see how it is reasonable and justifiable, in our

[20] See s 7(1); s 36(1) itself; and s 39(2).

constitutional society, to achieve such purpose by subjecting foreign defendants to arrest and detention.

[46] I am unaware of currently applicable legislation or case law in other countries which requires arrest as a prerequisite for civil jurisdiction over foreign defendants and no counsel involved in this matter were able to refer to any.

[47] There are less restrictive means to establish jurisdiction (whether founding or confirming) than by way of the defendant's arrest. First and foremost there can be attachment. Its legal competence is beyond question. However, if attachment is not possible because the defendant has no property here, there are alternative possibilities. Before considering their legal competence it is important to note that the respondents did not argue that if arrest were unconstitutional and attachment not possible, no jurisdiction could be established. Why that is important is because if arrest were held unconstitutional and it were further to be held that in this case, and cases like it, jurisdiction can competently be established without arrest, the necessary corrollary would be that it can also be established without attachment despite the need for attachment not having been in issue and despite attachment, generally, not being unconstitutional.

[48] I do not mean to say that where attachment is possible it is no longer a jurisdictional requirement. It is naturally not open to the court in this case, on the issues and arguments involved, to override or ignore precedent or principle. We are confined to the issue of arrest's constitutionality and the inevitable consequence if it is indeed unconstitutional and the alternative of attachment is not possible. In other words if the common law is to be developed by abolishing jurisdictional arrest, that development must necessarily involve providing practical expedients for cases where jurisdiction is sought to be established and there can be neither arrest nor attachment. One could, of course, hold that if arrest and attachment were, for separate reasons, no longer possible, then a resident plaintiff would simply have no basis for establishing jurisdiction in a case such as the present. On the other hand it is important, in my view, to remember that the practice of arrest and attachment came about in order to aid resident plaintiffs who would otherwise have to sue abroad. There is no reason why that rationale should not still apply.[21] It represents, in my view, a rational and legitimate governmental purpose.

[21] See the remarks of Watermeyer J in *Halse v Warwick* 1931 CPD 233 at 239 – '... why should South African Courts not come to the assistance of South African subjects and enable them to litigate at home just as the Dutch Courts came to the assistance of Dutch subjects?'

[49] Because arrest and attachment have been undisputed and long-standing jurisdictional requirements at common law the question whether jurisdiction in a suit against a foreign defendant can be established without either, has not been the subject of case law. It is a question that must now be resolved by reference to the court's obligations and powers under the Constitution.

[50] Section 173 of the Constitution empowers the court to develop the common law and s 39(2) requires the court, when interpreting s 19(1) of the Supreme Court Act and developing the common law, to promote the objects of the Bill of Rights.[22]

[51] It obviously involves circuitous reasoning to say that arrest is unconstitutional if there are alternatives, the legal competence of which are dependent on arrest being unconstitutional. It does not involve circuitous reasoning, however, to evaluate the alternatives as part of the overall process of developing the common law, which process is envisaged as encompassing the abolition of the practice of arrest and the adoption of a legally acceptable substitute practice.

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[22] Section 173 reads: 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

Section 39(2) reads: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[52] Consideration of a substitute practice can usefully start with the observation that this court has accepted, for purposes of reciprocal enforcement of a foreign judgment, that the defendant's mere physical presence within the foreign jurisdiction when the action was instituted is sufficient, according to South African conflict of law rules, for a finding that the foreign court had jurisdiction.[23] It may also be noted that in England, for example, service on a foreign defendant while physically present – albeit temporarily – within its borders is sufficient for jurisdiction provided the case has a connection with that country.[24] These are pointers to the acceptability – subject to the presence of sufficient evidential links – of mere physical presence as being an acceptably workable substitute for a detained presence. One might add – a self-evidently more acceptable substitute.

[53] In the course of argument passing reference was made to the words 'persons residing or being in' in s 19 (1)(a) of the Supreme Court Act when referring to those over whom a High Court has jurisdiction. [25] At first blush the phrase 'being in' seems to afford a basis on which it could be said that such persons include those who are merely physically present as opposed to

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[23] *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA) paras 7 to 9.
[24] Dicey, Morris and Collins *The Conflict of Laws*, 14th edition, Volume 1, 11-097, 11-103.
[25] Section 19(1)(a), it will be recalled, says a High Court has jurisdiction 'over all persons residing or being in and the relation to all causes arising - ... within its area of jurisdiction and all other matters of which, it may according to law take cognisance ...'

those domiciled or resident within the court's area of jurisdiction. I do not think the words 'being in' assist. A line of authority culminating in *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd*[26] holds that nothing turns on 'being in'; for purposes of s 19(1)(a) a court's jurisdiction depends on nothing short of residence and the defendant's residence within the jurisdiction is one situation in which a 'cause arises', the defendant then being amenable to that court.

[54] I nevertheless consider that jurisdiction in the present case will fall within the terms of s 19(1)(a) if the matter can be said to involve a 'cause arising' or be a matter of which the court 'may according to law take cognisance'. A 'cause arising' is not to be confused with a cause of action, and to determine what a 'cause arising' is, as also to determine of what matter a court may take cognisance, one is driven back to the common law jurisdictional principles.[27] If those principles can be developed to accommodate a situation like the present there will be conformity with s 19(1)(a). Which is not to say that the common law must conform to the legislation. It is rather the converse. The legislation in question has all along merely been concerned to reflect or implement the common law. All

[26] 1991 (1) SA 482 (A) at 492B-C.
[27] *Bisonboard* at 486C-J.

one is therefore looking to ensure is that between the Act and the development sought to be achieved there is harmony.

[55] Obviously the jurisdictional principles we are concerned with here have originated because courts have always sought to avoid having to try cases when their judgments will, or at least could, prove hollow because of the absence of any possibility of meaningful execution in the plaintiff's jurisdiction. It seems to me that, firstly, one has to apply reasonable and practical expedients in moving away, where necessary, from historical practices that cannot achieve what they were intended to. Secondly, the responsibility for achieving effectiveness, absent attachment, is essentially that of the parties, and more especially the plaintiff. Economic considerations will dictate whether a South African judgment has prospects of successful enforcement abroad and thus influence a plaintiff in deciding whether to attach and sue here or to sue there (leaving aside, of course, other costs considerations). And if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the *forum conveniens* and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant's domicile.

[56] In my view it would suffice to empower the court to take cognisance 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 concerned from the point of view of the appropriateness and convenience of its being decided by that court. Appropriateness and convenience are elastic concepts which can be developed case by case. Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction.

[57] As to the principle of effectiveness, despite its having been described as 'the basic principle of jurisdiction in our law'[28] it is clear that the importance and significance of attachment has been so eroded that the value of attached property has sometimes been 'trifling'.[29] However, as I have said, effectiveness is largely for the plaintiff to assess and to act accordingly.

[58] Therefore it seems to me that there are legally competent alternatives to requiring arrest as a jurisdictional prerequisite. Whether they can be established in the proposed litigation between the present parties it is impossible, from the record, to determine. Indeed, whether there are sufficiently close links with the area of jurisdiction concerned and whether

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[28] *Thermo Radiant* supra, at 307A.
[29] *Thermo Radiant*, supra, at 309D-E.

effectiveness is likely to be achieved are matters dependent on the facts of each case. They should be canvassed in the pleadings and can, in addition, be dealt with as separated issues in terms of Rule 33(4).

[59] For all these reasons the common-law rule that arrest is mandatory to found or confirm jurisdiction cannot pass the limitations test set by s 36(1). It is contrary to the spirit, purport and objects of the Bill of Rights. The common law must be, and is hereby, developed by abolition of the rule and the adoption in its stead, where attachment is not possible, of the practice according to which a South African High Court will have jurisdiction if the summons is served on the defendant while in South Africa and there is sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient. It goes without saying that the new practice could itself be subject to development with time.

[60] As far as s 19(1)(c) is concerned, it seems to me that the answer to the respondent's contention that this provision is unconstitutional essentially requires the provision's interpretation. I have already said that it enables arrest, it does not require it. Going into more detail, one finds that the background to the provision is this. Before its introduction by Act 122 of

1998[30] a High Court (using current terminology) had no jurisdiction to order the arrest or attachment of a person or property within the area of jurisdiction of another High Court. This was confirmed in *Ewing McDonald*[31] where extension of jurisdiction was unsuccessfully sought to be based on the terms of s 26(1) of the Supreme Court Act.[32] The extension issue was the subject of a Law Commission report in 1993 which recommended the change eventually brought about by the introduction of s 19(1)(c).

[61] Accordingly the aim and function of the provision, seen in proper context, was merely to effect an extension of a High Court's jurisdiction to order certain arrests and attachments. The word 'may' achieved that extension, reinforced as it was by the word 'also' in subpara (i). 'May' did not confer a discretion (as argued by the Minister) whether to order arrest or not. The provision also did not subsume the common-law rule. What it meant was that in so far as arrest was a requirement of the common law it could be ordered as long as the defendant was present anywhere within the country. Section 19(1)(c) provided the legislative machinery by means of which the common-law requirement could be fulfilled. Once that

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[30] See footnote 4.
[31] See footnote 7.
[32] Section 26(1) reads: 'The civil process of a [High Court] shall run throughout the Republic and may be served or executed within the jurisdiction of any [High Court].'

requirement is abolished it follows that the challenged words in s 19(1)(c) become redundant. They can be removed by legislative amendment and, until then, read down. They do not require a declaration of invalidity.

[62] As to costs, counsel for the appellant submitted that in the event of the constitutional issue being decided against the appellant the latter should not be ordered to pay costs. The reason, said counsel, was that in view of the respondents' refusal to consent to jurisdiction the appellant had been obliged to comply with the law as it was and to apply for an arrest order. Even if the appellant failed on the constitutional question it had not erred in any respect in making the application.

[63] That submission cannot prevail. The litigation in this case was not aimed at an organ of State nor conducted in the public interest. The appellant has not sought to establish or advance a constitutional right. It has sought to pursue commercial litigation and lost at the threshold stage. There is no reason why it should not pay the costs.

[64] For the respondent the costs of three counsel were asked for. Three counsel were employed by the appellant as well. In my view, however, there are insufficient grounds for regarding employment of three counsel as a reasonable precaution in this matter.

[65] The appeal is dismissed with costs, such costs to include the costs of two counsel.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

NUGENT JA
PONNAN JA
MAYA JA
MALAN AJA