69/85

Case No 242/83
mp

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BARCLAYS NATIONAL BANK LIMITED Appellant

and

ROBERT THOMPSON Respondent

CORAM: CORBETT, KOTZÉ, CILLIÉ, HOEXTER et HEFER, JJA

HEARD: 1 May 1985

DELIVERED: 29 May 1985

J U D G M E N T

HOEXTER, JA ...

HOEXTER, JA

In the Witwatersrand Local Division the appellant was the defendant in an action for damages instituted against it by the respondent. In what follows I shall refer to the respondent as the plaintiff and to the appellant as the defendant. Before the matter came to trial the plaintiff sought an amendment of his particulars of claim. The application for an amendment, which was resisted by the defendant, was heard by ACKERMANN, J. The learned Judge granted the amendment. With leave of the Court a quo the defendant appeals against the order allowing the amendment.

Sec 9 of the Currency and Exchanges Act, 9 of 1933, ("the Act") empowers the State President to make regulations in regard to any matter directly or indirectly affecting banking, currency or exchanges; and in such regulations to apply any sanctions, civil or criminal, which he thinks fit to impose. In terms of sec 9 of the Act

there .....

there were promulgated, under Government Notice No 1111 dated 1 December 1961, the Exchange Control Regulations ("the regulations") set forth in the Schedule to the Notice. Reg 3(1)(c) of the regulations reads:-

> "Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose -
>
> (a) .....
> (b) .....
> (c) make any payment to, or in favour, or on behalf of a person resident outside the Republic, or place any sum to the credit of such person."

Reg 22 penalises any contravention of the regulations by applying thereto a criminal sanction. It provides that every person who contravenes the regulations shall be guilty of an offence and liable upon conviction to a fine not exceeding R10 000, or to imprisonment for a period not

exceeding five .....

exceeding five years, or to both such fine and imprisonment.

The chief issue raised by the present appeal is the following. Take the case of a plaintiff resident outside the Republic who has a claim sounding in money against a defendant who is an incola of the Republic. The plaintiff seeks legal redress by instituting action against the defendant in a South African court in whose area of jurisdiction the defendant is domiciled. In such circumstances does the absence of Treasury permission, within the meaning of reg 3(1)(c), for payment by the defendant to the plaintiff of the amount of the latter's claim, or any portion thereof, entail any disability on the part of the plaintiff either (1) in suing the defendant or (2) in obtaining the court's judgment in the plaintiff's favour? Within the past decade these two questions have arisen in a number of actions for money claims heard in the Provincial Divisions of the Supreme Court. The resultant decisions have not

all been harmonious. In particular the current of judicial opinion on the subject in the Transvaal has differed somewhat from the views expressed thereon in some of the decisions of the Cape and Natal Provincial Divisions. Before examining the relevant decisions it is convenient at this stage briefly to indicate the facts of the instant case.

The defendant is a registered commercial bank which carries on business in the Republic and which has its registered head office in Johannesburg. The plaintiff is a person resident outside the Republic. The plaintiff instituted his action for damages in April 1974. In February 1976 the defendant filed a plea in bar, based on reg 3(1)(c), to the plaintiff's claim. The defendant pleaded that in respect of the plaintiff's claim no per= mission had been granted by the Treasury for payment thereof by the defendant to the plaintiff. Accordingly, so it was

averred, ...

averred, the plaintiff's action was barred. On 3 December 1982 the plaintiff gave notice of his intention to amend his particulars of claim by the introduction of a fresh paragraph alleging that on or about 6 January 1976 the Treasury had granted permission to the plaintiff in terms of reg 3(1)(c) for payment of the claim to the plaintiff. In response to the above the defendant gave notice of its intention to raise the following point of law in its opposition to the amendment sought. The proposed amendment was not competent in law, so said the defendant, as its effect would be to include a cause of action which had not existed at the time of the issue of the summons. In what fashion ACKERMANN, J resolved the opposed application may more usefully be considered after looking at the conflicting decisions to which reference has already been made. To an examination of these I now turn.

The first case to be noticed is that of Rhodesian Pulp and Paper Industries Ltd v Plastelect (Pty) Ltd 1975(1) SA 955 (W), to which I shall refer as "the Rhodesian Pulp case". In that case a Rhodesian company carrying on business in that country instituted an action in the Witwatersrand Local Division against a defendant carrying on business in the Republic for damages for an alleged breach of contract. To the plaintiff's claim the defendant filed a special plea. Averring that the plaintiff was a person resident outside the Republic, and that Treasury permission for the payment by the defendant of the sum claimed had not been obtained, the defendant invoked reg 3(1)(c). It pleaded that in the circumstances "it would not be lawful" for the Court to grant the relief sought. The plaintiff excepted to the special plea, asserting that reg 3(1)(c) did did not in law represent a bar to the relief claimed. The question arose whether permission by the Treasury prior to

the institution of the action was an essential ingredient of the plaintiff's cause of action. The Court (MOLL, J) answered this question in the affirmative. In the course of his judgment the learned Judge observed (959F/G):-

> "Having regard to the wide terms of the said regulations, it seems to me that it cannot be said that an order such as is claimed by the plaintiff could be made by this Court in the absence of the necessary permission from the Treasury. Without more the defendant is not competent to deliver to the plaintiff, i.e. to make payment of the said amount to the plaintiff. In the ordinary course an order such as this is made on the basis that immediate effect shall be given thereto."

Counsel for the plaintiff in the Rhodesian Pulp case submitted that reg 3(1)(c) "did not have the effect of introducing a further element into the plaintiff's common law cause of action" (959H-960A). This submission was rejected by MOLL, J who concluded (961 C/D):-

"....that .....

> ".....that it is in the present action necessary that permission from the Treasury or a person authorised by the Treasury should have been obtained prior to the institution of the present action and that such fact ought to have been stated in the plaintiff's particulars of claim."

Accordingly in the Rhodesian Pulp case the plaintiff's exception to the defendant's special plea was dismissed with costs.

The problem presented by the facts of the Rhodesian Pulp case in the Transvaal in 1974 arose in Natal early in 1975 in an action for provisional sentence which came before MILLER, J. The Natal case is reported as Banco Standard Toita de Mocambique v Corbett Enterprises (Pty) Ltd 1975(3) SA 300 (D). I shall refer to this decision as "the first Banco Standard case". In that case the plaintiff was a commercial bank resident in Mocambique and the defendant a company resident in Durban. The

plaintiff's .....

plaintiff's summons for provisional sentence did not allege that Treasury permission within the meaning of reg 3(1)(c) in respect of the payments claimed by the plaintiff had been granted. The defendant raised as a special defence that in the absence of such permission the plaintiff was not in law entitled to claim payment of the amounts set forth in the summons. MILLER, J found himself in agreement (305H-306A):-

> "... with the conclusion reached in the Rhodesian Pulp and Paper case, supra, that it is a good defence to a claim for payment of money to a person resident outside the Republic that the necessary permission of the Treasury to make such payment has not been granted."

However, the line of reasoning which led the learned Judge to the said conclusion was different from that adopted by MOLL, J in the Rhodesian Pulp case. MILLER, J reasoned that a judgment granted in favour of the plaintiff would be an ineffective one. Having referred (305A/C) to a judgment

creditor's ordinary rights to proceed to attachment and sale in execution of a judgment debtor's property, the learned Judge proceeded to say (305C/H):-

> "But when, as in this type of case, the creditor's right to put the judgment to use for purpose of actual recovery of what is due to him is beyond the Court's control or protection because his rights in that regard are entirely dependent upon the decision of another (the Treasury), the judgment lacks effectiveness.
>
> It appears to me that this is the only ground upon which the Court would be justified in refusing, because of absence of Treasury permission, to enter judgment for a plaintiff who has established that a debt is owing and due. There is no statutory bar to the exercise by the Court of its jurisdiction to enter judgment for a plaintiff who has established that the debt in respect of which he claims is due and payable, but of its own volition the Court will not, generally, enter judgment, or make an order, the right to enforce which it cannot protect. It has been repeatedly stated that, save for the principle of submission, 'the basic principle of jurisdiction is effectiveness'. (See Sonia (Pty) Ltd. v Wheeler, 1958(1) S.A. 555 (A.D.) at p 563; Eilon v Eilon, 1965(1) S.A. 703 (A.D.) at p 725F-G; Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd., 1969(2) S.A. 295 (A.D.)

at .....

at p 307). That principle applies not only to the broad concept of a Court's jurisdiction in relation to persons, territorial limits and subject-matter, but also, more narrowly, to specific orders or decrees which may be sought in any case in which, in the broad sense I have just indicated, the Court has jurisdiction. As BROOME, JP, observed in relation to admittedly different circumstances, but with general application, in Mansell v Mansell, 1953(3) S A 716 (N) at p 721:

> 'When, therefore, the Court is asked to make an agreement an order of Court it must, in my opinion, look at the agreement and ask itself the question: 'Is this the sort of agreement upon which the obligee (normally the plaintiff) can proceed direct to execution?' If it is, it may well be proper for the Court to make it an order. If it is not, the Court would be stultifying itself in doing so. It is surely an elementary principle that every Court should refrain from making orders which cannot be enforced. If the plaintiff asks the Court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears to me to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation.'"

Having decided that lack of Treasury permission would represent a valid defence to the plaintiff's claims MILLER, J next examined the affidavits in the case before him to determine whether the plaintiff's contention that they established that Treasury permision had in fact been given was correct and, if so, whether the plaintiff's claims were sufficiently liquid to warrant the grant of provisional sentence (306A). MILLER, J concluded (306A-307F) that the plaintiff's claims were not sufficiently liquid to sustain an order for provisional sentence. In the first Banco Standard case one of the arguments relied upon by counsel for the defendant (301H-302A) was that in the absence of an allegation that Treasury permission had been granted the plaintiff's summons was fatally defective. The conclusion at which MILLER, J arrived, adversely to the plaintiff, in regard to the liquidity of its claims rendered it unnecessary (307F/G):-

" .... to ....

> ".....to consider the defendant's argument that the summons is fatally defective for want of an appropriate allegation relating to exemption or permission."

In the result MILLER, J refused to grant provisional sentence on four bills of exchange accepted and endorsed by the defendant.

Subsequent to the decision in the Rhodesian Pulp case, and by Government Notice No R1555 of 15 August 1975, a further regulation ("the exempting regulation") was promulgated. The exempting regulation is in the following terms:-

> "In terms of reg 3 of the Exchange Control Regulations published under Government Notice R1111 of 1 December 1961, as amended, the Treasury hereby exempts any person from the obligation to obtain, as a prerequisite to the institution of any court action in connection with a transaction mentioned in sub-reg (1)(c), permission to make a payment to or in favour, or on behalf of a person resident outside the Republic, or place any sum to the credit of such person."

Also .....

Also in the year 1975, but subsequent to the judgment delivered by MILLER, J in the first Banco Standard case, a defence based on reg 3(1)(c) was raised in an action for damages heard in the Cape Provincial Division in McConnell v SA Stevedores Service Co (Holdings) (Pty) Ltd 1976(2) SA 126 (C). To this decision I shall refer as "the McConnell case". In that case the plaintiff was a resident of British Columbia and the defence set up was that he was not entitled to be paid the damages claimed since at the time of the institution of the action no Treasury permission had been granted for payment of the amount claimed. The action had been instituted before 15 August 1975 but was heard after that date. While not contesting the correctness of the view expressed in the two earlier cases that failure to obtain Treasury permission constituted a good defence to a claim for payment of money to a plaintiff resident outside the Republic, counsel for the plaintiff

in .....

in the McConnell case contended that it did not flow there= from that such Treasury permission was a prerequisite to the institution of his client's action; and he submitted that the Rhodesian Pulp case had been wrongly decided.

The McConnell case was heard by VAN WINSEN, J. Having examined the regulations the learned Judge found himself unable to deduce from their terms that in the case before him Treasury permission was a prerequisite to the institution of the plaintiff's action. In this connection the learned Judge observed (131A/C):-

> "I am unable to find anything in the control regulations from which such deductions can be made. They make no specific reference at all to Court actions, but deal in general terms with the making of payments. ..... Moreover it does not appear from the terms of the control regulations or, having regard to the successful attainment of the objects they were designed to serve, viz. to prevent the transfer of money out of the Republic without Treasury approval, that the obtaining of the exemption or permission therein referred to is

a .....

> a prerequisite to the institution of an action to secure such a payment. The purpose of the control regulations would not be subverted in the absence of such a requirement as long as permission was obtained before payment."

VAN WINSEN, J went on to state that the true explanation for the conclusion reached in the two earlier cases that absence of Treasury permission represented a good defence was to be found (131D/E):-

> "..... in the fact that a judgment granted in the absence of such permission lacks effectiveness because it cannot be enforced under all circumstances. This was the reasoning adopted in the Rhodesian Pulp and Paper Industries case, supra at p 959, and in the Banco Standard case, supra at pp 304-306, and I am in respectful agreement with the views so expressed."

The learned Judge went on, however, to point out (131F) that this conclusion, by itself, provided no answer to the question whether or not the fact of Treasury permission

was .....

was a prerequisite to the institution of the plaintiff's action; and he expressed the further view that the latter question fell to be answered by recourse to the rules of pleading. Proceeding from the premise (131F/G):-

> "..... that if proof of a certain fact or the fulfilment of a condition is necessary in order to enable a plaintiff to secure a judgment in his favour then such fact or the fulfilment of such condition should be alleged in his particulars of claim."

VAN WINSEN, J arrived at the conclusion (131G-132A) that in his particulars of claim the plaintiff was required to allege, "if such was the case", that the required Treasury exemption or permission had been granted.

In the light of certain alternative arguments raised by counsel for the plaintiff in the McConnell case VAN WINSEN, J also considered the scope of the exempting regulation and concluded that in regard to the issue before

the Court it was of no avail to the plaintiff (132A-133C). Accordingly VAN WINSEN, J upheld the defendant's special plea with costs.

At the end of 1975 the decision in the first Banco Standard case was reversed on appeal to a full Court of the Natal Provincial Division (JAMES, JP, SHEARER and HOEXTER, JJ) whose judgment is reported at 1976(2) SA 196(N). I shall refer to the latter judgment as "the second Banco Standard case". The Natal full Court took the view that MILLER, J had erred in holding that the plaintiff's claims were not liquid, and that the learned Judge had been wrong in refusing, for that reason, to grant provisional sentence (200A-201F). The full Court then proceeded to consider what MILLER, J had found unnecessary to decide, namely, whether the summons was fatally defective for want of an allegation of Treasury approval; and it decided that the summons was not so defective (201 F/G). The full Court

expressed .....

expressed the view (201H) that in the Rhodesian Pulp case MOLL, J had erred in holding that prior Treasury approval was an essential ingredient of the plaintiff's cause of action. It indicated its full agreement (201H) with the view expressed by VAN WINSEN, J in the McConnell case that there was nothing in the language of the regulations from which it might be deduced that Treasury approval was a prerequisite to the institution of action; and then remarked (201H-202A):-

> "The object of the regulations is the control of foreign exchange in the national interest. That aim is likely to be achieved just as effectively by securing Treasury approval, for example, during the course of an action, or after judgment, as by securing it before the issue of summons."

The full Court expressly dissented, however, (202B) from the opinion stated by VAN WINSEN, J in the McConnell case that the rules of pleading pointed to the conclusion that

it was necessary for the plaintiff to allege in his summons that Treasury permission had been granted. In the result the Natal full Court altered the order of the Court a quo by granting provisional sentence. It should be mentioned that in the second Banco Standard case the appeal was dealt with on the assumption that the absence of Treasury permission was a valid defence to the action. The Natal full Court expressed no firm opinion as to the correctness of the finding by MILLER, J that the absence of Treasury permission was in fact a valid defence.

In a number of later Transvaal decisions the correctness of the Rhodesian Pulp case has been either assumed or accepted - see, for example: Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd 1976(1) SA 93 (W); 1976(1) SA 100 (W); 1977(1) SA 298 (W). In Amaral v De Klerk 1979(4) SA 309 (W) GOLDSTONE, AJ remarked .....

remarked of the Rhodesian Pulp case (313E):-

> "I certainly cannot find that the approach of MOLL, J is clearly wrong and it is consequently binding on me."

In the Cape Provincial Division McConnell's case was approved by GROSSKOPF, J in Draft Negotiators Ltd v Grand Cleaners (Pty) Ltd 1977(1) SA 788 (C), and accepted (with reluctance) as binding upon him by THERON, J (1015H-1016C) in Draft Negotiators Ltd vs Silwoods Investments (Pty) Ltd 1977(3) SA 1014 (C).

To complete the survey of the dissonant decisions on the subject it is necessary to consider Euroshipping Corporation of Monrovia v Minister of Agriculture and Others 1978(2) SA 272(C) - hereafter referred to as "the Euroshipping case". In that case the plaintiff was a Liberian shipowner which instituted an

action .....

action for damages in the Cape Provincial Division against local defendants. No Treasury permission for payment had been obtained prior to the institution of the action which took place before 15 August 1975, the date of the promulgation of the exempting regulation. The first and second defendants filed special pleas based on reg 3(1)(c). In terms of Rule 33(4) of the Uniform Rules the Court was asked to determine, separately from other issues, the following questions of law:-

(a) Whether the failure to obtain, prior to the institution of the action, Treasury permission to satisfy the plaintiff's claims constituted a complete defence thereto; and, in the event of this question being answered in the defendant's favour:

(b) Whether the exempting regulation of 15 August 1975 cured the failure to obtain such permission.

Because .....

Because of the conflicting decisions bearing on the questions raised the matter was set down before a full Bench (WATERMEYER, BROEKSMA and FRIEDMAN, JJ). The full Bench unanimously answered the first question in favour of the plaintiff, with costs, and handed down the reasons for its order later. The reasons were prepared by BROEKSMA, J. Dealing with MILLER, J's invocation of the principle of effectiveness in the first Banco Standard case BROEKSMA, J observed (278A/B):-

> "No cases were cited to us nor have I been able to find any authority with the exception of the Rhodesian Pulp case supra and McConnell's case supra which support the proposition that, where the principle of effectiveness is thought to apply in the 'narrower sense' as mentioned by MILLER, J, the facts or circumstances required to render the judgment 'effective' must necessarily be in existence at the commencement of the action and be averred in the summons. Apart from the Rhodesian Pulp case supra and McConnell's case supra the general trend of the cases rather appears to be against the proposition that Treasury permission is to be part of a plaintiff's cause of action."

Nor did the full Bench consider that it was proper to determine the ingredients of the plaintiff's cause of action by referring (as VAN WINSEN, J had sought to do in McConnell's case) to the rules of pleading. The rules of pleading, so considered BROEKSMA, J (279C):-

> ".....cannot resolve the questions under discussion but follow upon their solution."

The full Bench concluded (279D) that in the case under consideration there was no good ground for holding that Treasury permission was a prerequisite to the institution of the action. The second question therefore fell away. It was likewise unnecessary for the full Bench to make any finding concerning the correctness of the view stated in some of the earlier decisions that absence of Treasury permission was a valid defence. In this connection BROEKSMA, J remarked (279 E/F):-

"Although .....

> "Although I have relied on certain of the cases in which it was held that mere absence of Treasury permission was a good defence, as indicative of the correctness of the view that it was not required prior to the institution of the action, I would emphasize that it was, because of the limited nature of the question before us, not necessary to express any opinion as to the correctness of the conclusions arrived at in those cases. I have, therefore, deliberately refrained from expressing such an opinion."

Against the background of the decided cases reviewed above I return to the judgment of the Court below in the present case. In granting the amendment for which the plaintiff asked ACKERMANN, J found:-

(a) that he was bound by the judgment of MOLL, J in the Rhodesian Pulp case: "I cannot find .... that the approach of MOLL, J was clearly wrong and am conse= quently bound by that judgment.";

(b) that .....

(b) that the exempting regulation promulgated on 15 August 1975 did not have retrospec= tive effect;

(c) that the general rule that the cause of action whereon a plaintiff relies must exist at the time of the issue of summons is subject to the Court's discretionary power, where exceptional circumstances exist, to allow an amendment importing a fresh cause of action;

(d) that on the facts of the case before him exceptional circumstances were present.

It is convenient at this stage to say something of the real issue in the appeal. The defendant has no quarrel with the findings of the Court a quo indicated in (a) and (b) above. Indeed, the plaintiff contends that the Rhodesian Pulp case was correctly decided. The defendant

seeks to attack the judgment of the Court below on the basis that the ruling of law in (c) and the finding of fact in (d) were wrongly made. The approach of the plaintiff is the following. While vigorously attacking its correct= ness he freely concedes that should the Rhodesian Pulp case wrongly have decided that, in such cases Treasury permission is an essential ingredient of the cause of action, then the plaintiff's application for an amendment was superfluous. He points out, however, that in December 1982 (when he gave notice of his intention to amend) the whole trend of judicial opinion on the subject in question in the Transvaal was such that he was entitled to assume that in adjudicating upon his case the Court a quo would accept the correctness of the Rhodesian Pulp case. That assumption proved to be correct. Moreover, so contends the plaintiff, even if he had challenged the correctness of the Rhodesian Pulp case in the Court below he would have taken into account, as a reasonably possible hazard, that on appeal this Court might approve the Rhodesian Pulp case. The defendant s contention is that in all these circumstances

his .....

his application for an amendment was a reasonable and prudent step. Upon a realistic view of all the facts in the present case it is clear, I consider, that despite the form and outward trappings of the appeal, the real and substantial issue between the parties on appeal is the correctness or otherwise of the Rhodesian Pulp case. What precipitated the plaintiff's application for an amendment was the plea in bar filed by the defendant. If the Rhodesian Pulp case were correctly decided the defendant's plea in bar was well-founded and it becomes necessary to consider whether ACKERMANN, J was right in deciding matters (b), (c) and (d) as he did. If, on the other hand, the Rhodesian Pulp case were wrongly decided, it follows that the defendant's plea in bar was misconceived; and that the further procedural steps set in train by the plea in bar have no real practical significance. They can contribute nothing to the ultimate adjudication of the

plaintiff's claim when the matter proceeds to trial. In the latter situation the correctness or otherwise of the rulings of the Court a quo upon points (b), (c) and (d) is a matter of no more than academic interest.

Counsel for the defendant submitted to us that the Rhodesian Pulp case was correctly decided. It was urged that on the clear language of reg 3(1)(c) there was created a general prohibition against payment to or on behalf of a foreign resident subject to the two exceptions mentioned, namely, Treasury exemption or Treasury permission. Since the fact of Treasury exemption or permission "entitles" the non-resident plaintiff to a payment to which he would otherwise not be entitled, so the argument proceeds, it follows that Treasury exemption or permission is an element in the cause of action. Counsel further submitted that, affecting the matter of pleading and proof in cases of this

sort .....

sort, the legal position was correctly stated in the McConnell case. I am unable to accept the argument that Treasury exemption or permission is a fact which "entitles" the plaintiff to payment. This argument, as counsel for the plaintiff pointed out, confuses legal liability with performance. What entitles the plaintiff to payment is the existence of a valid claim reinforced (should the Court uphold it) by a judicial decree. The presence or absence of Treasury exemption or permission is relevant only insofar it may be necessary to consider whether in making due performance of his legal and fully exigible obligation to the judgment creditor the judgment debtor commits or does not commit the criminal offence created by reg 22. The commission or avoidance of that offence by the judgment debtor has nothing whatever to do with the independent existence of the plaintiff's claim and its due enforcement by legal process. I further disagree with

the submission that in the McConnell case a proper test was applied in order to determine the ingredients of the plaintiff's cause of action. The rules of pleading cannot, I think, assist in this inquiry. What dictates the mould of the pleadings is the cause of action itself. To approach the problem as VAN WINSEN, J did in the McConnell case (131 F/G) is, in my respectful opinion, to beg the question. In this connection I find myself in agreement with the remarks of BROEKSMA (279C) in the Euroshipping case quoted earlier in this judgment.

In passing I point out that curious and unsatis= factory results flow from the construction of reg 3(1)(c) for which the defendant contends. By way of illustration one or two examples of the anomalous consequences will suffice. A plaintiff resident within the Republic at the time of the institution of his action sounding in money might well be deprived of his cause of action if before judgment he were

to .....

to take up residence outside the Republic. Conversely, a plaintiff resident outside the Republic at the time of the institution of the action would not be entitled to judgment despite the fact that immediately after instituting the action he took up his residence within the Republic.

Leaving aside the exceptional case of enemy aliens in time of war, the suggestion that plaintiffs residing beyond the Republic should be denied access to our Courts by a purely administrative act unrelated to the administra= tion of justice is, I think, repugnant both to ordinary notions of justice and to common sense. By our common law the litigant's right of access to the Courts is an elemen= tary and fundamental one. That right the common law accords to every plaintiff whether he resides within or beyond the Republic. In my view one cannot conceive that the legislature intended to subject litigants of the class

with .....

with which we are concerned to such a sweeping disability unless such a conclusion is to be gathered clearly from the explicit language of reg 3(1)(c) or the conclusion is inevitable as a matter of necessary and distinct implication. In my view the language of reg 3(1)(c) is not susceptible of the meaning which counsel for the defendant would assign to it. Reg 3(1)(c) makes no reference whatever to legal proceedings. Had the object behind reg 3(1)(c) been to make legal proceedings an instrument for the enforcement of reg 3(1)(c) by requiring Treasury exemption or permission as a prerequisite to an action for the payment of money by a plaintiff living outside the Republic, it would have been a simple matter so to frame it. Reg 3(1)(c) is not so framed. Nor, in my view, can it be said that the construction for which the defendant contends is to be derived as a matter of necessary implication. Bearing in mind the purpose of the regulation there is, I consider,

nothing .....

nothing in the language of reg 3(1)(c) which even remotely carries such an implication. Embodied in the regulations is a criminal sanction which is designed to enforce com= pliance therewith. The penalty prescribed for non-compliance is a stiff one. In my view the legislation was here content with the said criminal sanction as being sufficient to ensure compliance with reg 3(1)(c).

The issue which arises in this appeal is a matter on which this Court has not yet pronounced. In this connection I should point out that the remarks by STEYN, CJ in Nestel v National and Grindlay's Bank Ltd 1962(2) SA 390 (A) at 393H - suggesting that in cases of this nature Treasury permission is a prerequisite to the institution of action - were made quite incidentally in recapitulating purely historical matters; and were clearly obiter. See further in this regard the observations of MOLL, J (958 C)

in .....

in the Rhodesian Pulp case. I am consequently of the opinion that it is open to the Court, unfettered as it is by any decision of its own, to conclude, as I do, that the obtaining of Treasury exemption or permission in terms of reg 3(1)(c) is neither a prerequisite to the institution of an action by the plaintiff in a case such as the present, nor does its absence constitute a valid defence to the plaintiff's claim.

It remains to consider whether in the absence of such exemption or permission a Court has the right, mero motu, to decline to grant judgment in favour of the plaintiff on the ground that such a judgment will be ineffective. For the reasons which follow this question must also be answered in the negative.

In this connection I agree with the submission advanced by the plaintiff's counsel that the question

whether .....

whether or not the Court's order for payment of money will result in satisfaction of the judgment creditor's claim is not a jurisdictional issue. It is important to bear in mind, I think, that in the law of jurisdiction the principle of effectiveness relates to the mere power of a Court to give an effective judgment rather than to the exertion of that power in any particular instance. The matter is succinctly stated by Pollak in footnote 2 on p 208 of The South African Law of Jurisdiction:-

> ".....the principle of effectiveness does not mean that a court has no jurisdiction unless it can in fact make its judgment effective against the particular defendant. It means merely that the judgment of the court should normally be effective against a person in the position of the defendant. That is why the domicile of the defendant, although unaccompanied by physical presence, is a ground for jurisdiction in an action for a judgment sounding in money."

The position is further clarified, I think, by

certain .....

certain observations of POTGIETER, JA in the judgment of this Court in Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969(2) SA 295 (A). The judgment of POTGIETER, JA (in which STEYN, CJ concurred) was indeed the minority judgment, but I perceive no dissent in the Court's majority judgment from the following general statement of the law (309 F/H) by POTGIETER, JA:-

> "Jurisdiction is ..... a somewhat abstract notion and I do not think that the word 'effectiveness' should be taken too literally. It should, I consider, not be equated with a guarantee that in every case the judgment of the Court would be satisfied completely. It has never been disputed that in our law, as in English and American law, a Court has jurisdiction in respect of a resident incola on the principle of effectiveness; and the reason why the Court can give an effective judgment is because it is considered that usually a person's possessions are where his home is, and that execution can be levied against those possessions. Yet it may happen that the amount of the judgment may to some considerable extent exceed the value of his possessions and that execution thereon will, therefore, not satisfy the judgment. It has

never .....

> never been suggested that a court can exercise jurisdiction in respect of a resident incola only if he has sufficient assets in the court's territorial jurisdiction which will, on execution, completely satisfy the debt."

I would only add that it could hardly be successfully argued that a Court would lack jurisdiction in respect of a resident incola on the principle of effectiveness for the reason that he was a man of straw with no assets whatever.

It is necessary to deal briefly with the essential facts in the case of Mansell v Mansell (supra) upon which reliance was sought to be placed in the first Banco Standard case. That case was heard before the Matrimonial Affairs Act, 37 of 1953, came into operation; and it was decided according to the common law principle that an innocent wife had no right to claim maintenance after divorce. According to the judgment in Mansell v Mansell (720 E) the plaintiff wife was:-

"... asking .....

> "..... asking the Court to make an order by consent which will give her relief which she could never have claimed in the action."

It is not a matter for surprise, therefore, that the request of the plaintiff wife in that case was declined. I would respectfully suggest, however, that in Mansell v Mansell the principle of effectiveness as a criterion of the Court's jurisdiction was not in issue.

The question whether, and if so, to what extent, the competence of our Courts has been curtailed by reg 3(1)(c) has been discussed in a comprehensive and lucid article by A C Beck in 1982 (vol 99) SALJ at pp 125-135. In my judgment the legal position is correctly summed up by the learned writer in the two passages of his article hereunder quoted:-

> "The doctrine of effectiveness, it is submitted, is not of application in this type of case, but is confined to the sense in which it is ordinarily

understood .....

understood. That being so, provided that the defendant is resident within the area of the court's jurisdiction (or some other basis exists for the exercise of jurisdiction) the court will be able to grant an 'effective' judgment against the defendant and, if necessary, order execution against his property. The purely economic requirement of exchange control, it is submitted, in no way fetters the court's jurisdiction or power. The plaintiff is entitled to his judgment, and Treasury permission is a hurdle which can be jumped when it is reached."

(p 133)

"To conclude: The courts would do better to avoid concerning themselves with the effects of Treasury being granted or withheld. It is not really within the province of the courts to try to weave around the requirement, and in their attempts to do so a great deal of unnecessary hardship has been caused to plaintiffs at the expense of defaulting debtors, which was certainly not intended by the legislature, whose purpose is achieved whenever the permission is given, if at all.

Treasury permission has no bearing on the jurisdiction of a court and, in fact, does not even constitute defence to the action - it is merely a limitation on payment, which can be removed by the Treasury at any time, and there is no reason why the plaintiff should have to wait for this before obtaining a judgment."

(p 135).

From .....

From the aforegoing it follows, in my judgment, that both the Rhodesian Pulp case and the McConnell case were wrongly decided. That finding disposes of the true and material issue in the appeal, and it is, I consider, unnecessary to debate the correctness or otherwise of findings (b), (c) and (d) of the Court a quo summarised earlier in this judgment.

It remains to consider, in the somewhat unusual situation confronting this Court, what orders should appropriately be made as to the fate of the appeal and the costs of the appeal. The conclusion at which I have arrived in regard to the Rhodesian Pulp case means in effect that the defendant's plea in bar was bad in law; and, therefore, that the plaintiff's application for amendment consequent thereon was superfluous. Technically speaking, therefore, the Court below should not have granted the amendment. However, for the reasons stated

earlier .....

earlier in this judgment, it seems to me that one must look at the substance of the appeal rather than its form. So viewing the whole case I conclude that on appeal the party achieving substantial success is the plaintiff; that the appeal should fail; and that the plaintiff is entitled to his costs on appeal. Nothing turns on the order for costs made in the Court below inasmuch as the learned Judge ordered the plaintiff to pay the costs occasioned by the amendment, including the costs of the defendant's opposition thereto.

In the result the appeal is dismissed with costs including the costs of two counsel.

G G HOEXTER, JA

CORBETT, JA)
KOTZé, JA)
CILLIé , JA) Concur
HEFER, JA)