99/86

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ERIC SONGEZO MAGIDA ..... Appellant

and

THE MINISTER OF POLICE ..... Respondent

Coram: JANSEN, JOUBERT, VILJOEN, BOSHOFF JJA et NESTADT AJA.

Date of Hearing: 7 March 1986

Date of furnishing reasons: 18 September 1986

REASONS FOR JUDGMENT

JOUBERT, JA :

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On 1 March 1984 EKSTEEN J. in the Eastern Cape Division granted an order compelling the appellant as a peregrinus to furnish security in the sum of R2000 for the respondent's costs in an action instituted by the appellant against the respondent. The Court a quo granted the appellant leave to appeal against its order to this Court. Having heard the appeal on 7 March 1986 this Court reserved its judgment. Subsequently this Court on 23 May 1986 upheld the appeal with costs, in= cluding the costs of two counsel, and substituted the following order for the order of the Court a quo, viz. "Application dismissed with costs." This Court also intimated that its reasons would be filed later. These are the reasons :

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The material background facts to the appeal are uncomplicated and not in dispute. They can be stated succinctly as follows. The appellant who was a citizen and an incola of the Republic of South Africa at all material times resided in Mdantsane in the Ciskei, (part of the Republic of South Africa until 3 December 1981) but was employed as a labourer in East London. On 4 February 1981 the appellant instituted an action in the Eastern Cape Division against the respondent in which he claimed R2 500 damages in respect of an alleged assault on him on 6 August 1980 by certain members of the South African Police. The respondent defended the action and the pleadings took their normal course. On

4 December 1981 the Status of Ciskei Act No 110 of 1981, however, came into operation. By virtue of its provisions the Ciskei ceased to be part of the Republic of South Africa and in its own right it became a sovereign and independent State (sec.1). The appellant also ceased to be a South African citizen and became a citizen of the Republic of the Ciskei (sec.6(1)). In the result the appellant ceased to be an incola of the Republic of South Africa and became an alien or a peregrinus. The pleadings in the action were brought to finality and on 24 August 1983 the Legal Aid Board granted the appel= lant legal aid to prosecute his claim against the respon= dent to finality. In the meantime the respondent,

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acting in terms of Rule 47 of the Uniform Rules of Court, brought an application in the Eastern Cape Division demanding security for his costs in the amount of R2000 against the appellant on the ground that the appellant had become a peregrinus. This application was con= tested by the appellant. The appeal to this Court was brought against the order of the Court a quo in the application, as indicated above.

The geographical expansion of the Roman State made free foreigners or aliens (peregrini) within its confines subjects of the Roman State but they lacked Roman citizenship (civitas). "To a considerable extent the Roman State allowed them to live in communities which had their own territory, their own law, and their own

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administration, subject only to the permanent control and power of intervention vested in the provincial governors" (Fritz Schulz, Classical Roman Law, 1st ed., p.77). The jus civile was that branch of Roman private law which applied to Roman citizens (cives Romani) only (ius proprium civium Romanorum) whereas the ius gentium was that branch of Roman private law which was available to both Roman citizens and peregrini (Van Oven, Leerboek van Romeinsch Privaatrecht, 2e druk p. 12). The office of praetor peregrinus was created in 242 B.C. to administer civil proceedings between Roman citizens and peregrini and between peregrini and peregrini (Hunter, Roman Law, 2nd ed., p.31: Thomas, Textbook of Roman Law, p.35). In 212 A.D. the Emperor Antoninus Magnus (Caracalla) by his enactment, the so-called constitutio Antoniniana, for all

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practical purposes bestowed Roman citizenship on all free non-Roman subjects of the Empire. D.1.5.17; Van Oven, op.cit.,p. 13 footnote 32; Buckland, A Text-book of Roman Law from Augustus to Justinian, 2nd ed, p. 98-99. "It is enough to state that by that constitution Roman citizenship almost lost all its importance for Roman private law. The unification of private law was, at least legally, achieved." (Fritz Schulz, op.cit., p. 80-81). This explains why Roman law never developed a jus Peregrinum. Henceforth the foreigners were the barbarians (barbari) outside Roman territory.

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It was the barbarians who brought about the collapse of the Roman Empire. After the fall of Rome in 476 AD the Germanic peoples in Western Europe lived according to their own laws (volksregte). All persons who did not belong to a particular nation or tribe were regarded as foreigners (peregrini, vreemdelingen, buitenlanders, uitlanders). This was the original wide meaning attributed to the word foreigner (peregrinus) e.g. an Italian or a Frenchman who was not a member of the Dutch nation at all was a peregrinus in the Netherlands. But the word foreigner (peregrinus) also acquired a more restricted meaning which was influenced by the concept of domicile. This may be illustrated by means of the following example with which the Roman-Dutch jurists

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were familiar. Before 1581 various regions (gewesten), such as counties and dukedoms, comprised the Netherlands, each of them being an independent, autonomous State while their natural-born inhabitants (cives, burghers, inboorlingen, indigenae) were Dutch. Yet a natural-born inhabitant of the Dukedom Gelderland, for instance, who was not domiciled in County Holland was regarded as an uitlander or peregrinus in County Holland as opposed to the natural-born inhabitants or native Hollanders of the latter county. See Wessels, History of Roman-Dutch Law, 1908, p.676; Van der Keessel (1738-1816) ad Gr 1.13.1.

In 1581 the seven constituent members of the Republic of the United Netherlands became known as provinces, each of them retaining its status as an independent, autonomous

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State with its own sovereign legislature (Staten).

In applying certain principles of Roman law, such as domicilium facit incolas (Cod. 10.40. 7pr.) and incola est qui in aliqua regione domicilium suum contulit (D 50.16.239.2), the medieval jurists reached an important result, viz. that a foreigner who acquired a domicile of choice in a region became an incola of that region. See the German jurist Gail (1526-1587), Practicarum Observationum , lib. 2 obs. 35 nrs 3 et 8. It thus became possible to distinguish between domiciled foreigners (incolae) and non-domiciled foreigners. It also followed that a natural-born inhabitant domiciled in his own native region was both a civis and an incola of that region. (Gail, op.cit., lib. 2 obs. 35 nr. 1). On the other hand

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a domiciled foreigner was an *incola* but not a *civis*. See Voet (1647-1713) 5.1.93. Such a domiciled foreigner was considered to be a *quasi civis* by Baldus (1327-1400) *ad* Cod. 1.1.1 nr. 13:

"- - - respondeo quod consentiente patre ibi constituat domicilium. Nam ratione domicilii est effectus sub illa lege: quia quasi civis est, ut Cod. 5.32.1." I may add in parenthesis that the Roman-Dutch jurists called the domiciled foreigners *incolae*, *inwonende vreemdelingen*, *inwoonders* whereas the non-domiciled foreigners were *extranei, exteri, buitenlanders, uitlanders*.

In many of the Western European countries, including County (later Province) Holland, foreigners

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suffered from many disabilities of which the following were instances:

1. According to the ius albinagii (droit d'aubaine) the property of a foreigner on his death escheated to the Sovereign (landsheer) unless the latter had conferred on him the ius testandi to dispose of his estate by will. This disqualification applied only to foreigners domiciled in County (later Province) Holland and not to non-domiciled foreigners. See Antonius Gubertus Costanus, Tractatus seu Commentarius de Matrimoniis, nr 9 in volume 9 Tractatus Tractatuum, 1584, folio 51; De Groot (1583-1645) 1.13.1; Arntzenius (1734-1797), Institutiones Juris Belgici Civilis de Conditione Hominum, 1783, Pars 1 tit 12 nr 5; Rechts= geleerde Observatien deel 2 obs. 17; Van der Keessel ad

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Gr. 1.13.2, 2.16.1; Fockema Andreae-Fischer ad Gr.1.13.2.

2. According to the recht van issue/exue a town empowered by charter or custom could impose a duty or tax (pondgelden) on the heirs of the deceased foreigner before they could remove their inheritances out of the town. This tax could also be imposed on natural-born subjects as well as foreigners who wanted to migrate. See Schorer (1717-1800) ad Gr.1.13.2; Van Leeuwen (1626-1682) R.H.R. 3.11.13; Arntzenius, op.cit., Pars 1 tit 12 nr 8; Van Zurck, Codex Batavus, s.v. exue: Van der Linden (1756-1835) 1.2.4; Fockema Andreae-Fischer, loc.cit. .

3. The incapacity to hold high offices. See De Groot 1.13.2 , Rechtsgeleerde Observatien, deel 3 obs.21, Voet 1.5.2 Van der Keessel ad Gr. 1.13.2.

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4. The incapacity to give evidence against natural-born subjects (cives, poorters, indigenae) according to De Groot 1.13.2, Voet 1.5.2, Rechtsgeleerde Observatien deel 2 obs 18, Van der Keessel ad Gr. 1.13.2, Fockema Andreae-Fischer, loc. cit. .

5. Crimes or delicts committed against foreigners were lightly punished. Voet 1.5.2, Rechtsgeleerde Observatien deel 2 obs. 18.

Sometimes foreigners flocked in large numbers to foreign countries where they settled and started to develop industries. Moreover in the course of time the expansion of commerce and the increased communication between nations contributed towards the amelioration of the condition of foreigners. De Groot 1.13.3., Voet

1:5.2, Van der Linden 1.2.4. The ius albinagii and the recht van issue/exeu were formally abolished towards the end of the 18th century. De Blécourt-Fischer, Kort Begrip van her Oud-Vaderlands Recht, 7th ed., p.53-54.

According to Roman-Dutch law domiciled foreigners (incolae) enjoyed in legal proceedings the same advantages as natural-born subjects (cives, indigenae) but non-domiciled foreigners were in two respects at a distinct disadvantage. First, unlike a civis or an incola the person of a non-domiciled foreigner could be arrested or his goods could be attached to found juris= diction (iurisdictionis fundandae causa). See Voet 2.4.18, 22, 23; Merula (1558-1607), Manier van Procederen,

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1783, lib. 4 tit. 2 cap. 25 nr. 1; Kersteman,(1728-1793), Hollandsch Rechtsgeleert Woordenboek; s.v. Arresten; Van der Keessel ad Gr. 1.13.3 van Rechts-pleging. Secondly, a non-domiciled foreigner who initiated civil proceedings against an incola could, in the discretion of the court, be compelled to furnish security for payment of the costs of his adversary (wederparty) and for payment of that which his adversary may be awarded in reconvention (Van Leeuwen, R.H.R. 5.17.9; Voet 2.8.1; Van der Linden 3.1.2 nr. 14; Wessels, op.cit. p. 677). The usual form of suitable security was by giving sureties (fideiussores) who were subject to the jurisdiction of the court. This was done by means of a cautio fideiussoria. Groenewegen (1613-

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1652) ad D 2.8.7.1 nr. 2; Van der Keessel ad Gr. 1.13.3. van Rechts-pleging; Van der Linden in his note (g) on Voet 2.8.1, in the Paris edition of Voet, under the "fourth question" expresses the view that a plaintiff could not be compelled to furnish real security or one by pledge (cautio pigneraticia). For support of this proposition he relies, inter alia, on a decision of the Court of Holland in 1785. A translation of his "fourth question" is to be found in Gane's translation of Voet volume 1 p. 336-337. The wording of this note (g) is identical to the text of Van der Linden's Verhandeling over de Judicieele Practijcq of Vorm van Procedeeren, 1794, 1e deel boek 2 hoofstuk 4 nr. 4.

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What is the position if the non-domiciled foreigner was unable to give sureties (fideiussores) by means of a cautio fideiussoria ? The Roman-Dutch jurists relying on the medieval jurists and the jurists of the 16th century found the answer in the cautio juratoria which was adopted in practice by the Dutch courts and which also featured in litigation before the Hooge Raad as the highest tribunal both of Province Holland and West-Friesland and of Province Zealand. Consult, for instance, 1 Observationes Tumultuariae 39, 239, 1004; 2 Observationes Tumultuariae 1904; 4 Observationes Tumultuariae 3020; 1 Observationes Tumultuariae Novae 463; 2 Observationes Tumultuariae

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Novae 704, 1082.

The cautio juratoria originated in Roman law as security by oath or juratory security. A privilege was conferred on viri illustres according to which they could in the normal course of judicial pro= ceedings obviate the requirement of providing sureties (fideiussores) as security by means of a cautio juratoria (Cod 12.1.17). Justinian extended the application of the cautio juratoria to assist poor or needy litigants who could not provide a surety (fideiussor). In 531 A D he decreed that men were compelled to furnish security in legal proceedings in which their freedom was in danger through being claimed as slaves provided that

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they were in a position to provide sureties. But if it was impossible for them to do so then a cautio juratoria was to be furnished to that effect (Cod 7.17.1.2). In 541 AD he enacted that a plaintiff could avail himself of the cautio juratoria by declaring on oath that he could not furnish a surety but that he would prosecute the case to its end. See Novella 112 cap 2 pr. to which medieval jurists referred as Cod. 1.3. authentica generaliter although there is a noticeable difference in their wording. Finally, in his Institutes 4.11.2 Justinian provided that a defendant who appeared in person to defend an action was not required to give security propter litis aestimationem but he could content himself by giving a cautio juratoria

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viz. that he would subject himself to the jurisdiction of the court until the end of the proceedings. It was the medieval Glossators who made the cautio juratoria available in general to any person who was obliged to furnish security by means of a surety (fideiussor) but was unable to do so. See the gloss on 'fideiussoribus' D 2.8.1 : "- - - Si autem qui fideiussorem dare debet, dare non potest, remittitur iuratoriae cautioni, ut iuret se fideiussorem dare non posse, & se facere quod caveat : ut Inst 4.11.2 & Cod 1.3 authentica generaliter sed etiam nuda promissio sufficit, si hoc partibus placeat: ut Inst 2.1.41 & D 50.16.61." The effect of the cautio juratoria was to supersede the cautio fideiussoria as

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the great medieval Commentator Baldus (1327-1400) ad Cod 1.3 authentica generaliter nr. 4 observed: "In textu ibi iuratoriam. Nota quod iuratoria cautio succedit loco fideiussoris dum tamen duo iurentur, videlicet quod fideiussor non invenitur et quod faciet quod incumbit - - - "

To revert to the furnishing by a non-domiciled foreigner of a cautio juratoria instead of a cautio fideiussoria. According to the consensus opiniorum of the Roman-Dutch jurists he had to comply with two requisites which Van der Linden describes in his note (g) on Voet 2.8.1 (Gane's translation vol 1 p. 335) as follows:

> "The first question is, What ought he, who not finding suitable sureties tenders security

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by way of oath, to swear ? The answer must be that such security comprises two headings. It is not enough for the plaintiff to undertake on oath that he will pay the costs, should he be condemned by judgment of the judge to pay them. The plaintiff must also make a sworn declaration that though he did his best he was unable to find a surety - - - "

This exposition is also in accordance with his Koopmans Handboek, 3.1.2 nr. 14. See also Gail, op.cit., lib. 2 obs 46 nr. 8; Damhouder (1507-1581) Practijcke in Civile Saecken, cap 99 nr. 8; Van Leeuwen R.H.R. 5.17.10 as well as his note on Peckius, Verhandelinghe van Handt-opleggen ende Besetten, 1659, deel 15 nr. 4 p. 284-285; Voet 2.8.4 in fine and Van Zutphen († 1685),

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Nederlandtsche Practijcke, s.v. Cautie Iuratoir nr. 1.

A precedent for the cautio juratoria is supplied by Wassenaar (1589-1664) in his Practijck Judicieel, 1729, cap.1 nr. 70 as follows: Cautio Jugatoir. (sic)

> "Op huiden etc. N ende verklaarde by Eede dat hy geen cautie of borge in den Landen van Utrecht den voorsz. Hove subject en wist te bekomen, hem selven by Eede obligerende, in gevalle hy in de zake voor den Hove van Utrecht hangende tusschen hem als etc - - ten eenre en T ter andere zyden succumberende, de kosten te betalen, ende geen goed weerloos te sullen worden noch vervreemden in fraude van de zelve cautie."

This precedent may be criticised for not embodying the two requirements of a cautio juratoria fully.

It was left entirely to the discretion of the judge who heard an application for the furnishing of

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security by a non-domiciled foreigner to refuse or grant the latter permission to furnish security on oath by means of a cautio juratoria. Such decision depended upon the particular circumstances of the case with due regard to what was just and equitable as well as conducive to justice being done. Compare Kersteman, op.cit., s.v. cautie juratoir :

> "Dog hoewel de propositie aan de zyde van een Aanlegger gedaan, ten einde onder benificie van dien zijn Actie te vervolgen, zekerlyk in alle opzigten afhangt van de Discretie van den Rechter, as welke volkomen bevoegt zyn om het selve na gelegentheid van Personen, en Zaken te accordeeren, of te weigeren; Zoo is 't nogtans klaar, dat geen Rechter zwarig= heid zal maken van zulks te accordeeren, wanneer hy de zaake gefundeert en billik bevind; Het geen te meer presumtif is om dat 'er de be= vordering van de Justitie indisputabel aan geleegen legt."

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See also Peckius, op. cit., deel 16 nr. 4.

The conclusion to be drawn from my investi= gation of the sources of our common law is that an incola by claiming security for his costs against a non-domiciled foreigner did not assert a right flowing from substantive law. In other words, an incola did not have a right which entitled him as a matter of course to the furnishing of security for his costs. It was a question of practice in the Dutch courts that a judge should hold an inquiry to investigate the merits of the matter fully. The approach of the judge was not to protect the interests of the incola to the fullest extent. He had a judicial

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discretion to grant or refuse the furnishing of security by means of a cautio fideiussoria by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the incola and the non-domiciled foreigner. If the non-domiciled foreigner was, however, unable to find a surety (fideiussor) he could, if he so wished, tender security by way of pledge (cautio pigneraticia) but he was not compelled to do so, according to Van der Linden in the "fourth question" discussed in his note (g) to Voet 2.8.1 where he invokes the authority of Novella 112 c 2 and a decision of the Court of Holland in 1785. The Dutch jurists in their

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treatment of the subject of furnishing security by *cautio fideiussoria* or *cautio juratoria* certainly did not consider the dice to be loaded against a non-domiciled foreigner. On the contrary, their approach was most benevolent to the non-domiciled foreigner by stressing *inter alia* the following relevant aspects :

1. Where the non-domiciled foreigner is a *vagabundus* without a fixed residence and has no country of his own (die ginck dwalen, ende gheen seeckere woonplaats en hadde, geen eygen Landt ende Jurisdictie van dien Rechter en besadt) the judge should be more readily disposed to order him to furnish adequate sureties (*fideiussores*) unless he possessed fixed property in respect of which he could furnish a

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hypothec. (Damhouder, op. cit., cap.99 nr. 6).

2. No one should be required to furnish security beyond his means to an incola. Nor should a non-domiciled foreigner be compelled to perform the impossible. Van Alphen (1608-1691) Papegay ofte Formulier Boek, 1682, Eerste Deel Hoofstuk 24 Request 9 Mandement van arrest op goederen om de Jurisdictie te fonderen nr. 10 : "Niemand is gehouden te stellen cautie vorder as hy kan - - - "

3. The object of the cautio juratoria, based on considerations of equity and justice, was to prevent an impecunious non-domiciled foreigner from being deprived of his right to litigate against an incola. Peckius, op.cit., deel 16 nr. 4 p. 293 : "Want genoomen den aanlegger was wel

arm, ende soodanich dat hy geen pandt ofte borgh en hadde te stellen, niet te min een goedt ende eerlijck man, soude hy daarom van sijn recht versteecken werden, ende de quaede saacke sijn loop hebben ? het onrecht en mach ontrent het recht geen plaats hebben". On this passage Van Leeuwen wrote the following footnote: " - - - dat soo wanneer yemandt geen borghe weet te vinden, ende door geen ander middel en kan geholpen werden, den selven volstaan mach met sijnen eedt, ende cautie juratoir, van t' allen tijden in recht te komen, de saacke ten uyteynde te vervolgen, de kosten te betalen, so hy in het ongelijk gestelt werdt, ende diergelijcke- - -" See also Damhouder, op.cit., cap.99 nr. 8; Merula, op.cit.,cap. 1 nr. 2; Kersteman, loc.cit. : "- - - als een Aanlegger

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van een Rechtsgeding een Buitenlander of Vreemdeling zynde, met geen mogelykheid Cautie voor de kosten van den Processe stellen kan, als wanneer volgens het eenparig sentiment der D.D. geoordeelt word dat zodanig een Eysscher of Aanlegger ten einde van zyn Recht en Actie ter saake van zyn Vreemdelingschap niet versteeken te blyven, met de gepresenteerde Cautie Juratoir behoord te volstaan;" Van der Linden in the "sixth question" in his note (g) to Voet 2.8.1 : "The sixth question is, Can this security be claimed from those who are so poor that free advocacy is vouchsafed them (those who are served pro Deo, and without the use of stamps) ? We approve rather of the opinion of those who say No.

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To wring an oath from those who are found in such poverty is simply to open a door for foul play."

4. The fact that the non-domiciled foreigner was an honourable man weighed in his favour. Van Alphen, loc.cit.; Voet 2.8.1. On the other hand the fact that he was a dis= honourable person (Van der Linden in the "fourth question" in his note (g) to Voet 2.8.1) or a suspectus de fuga (Groenewegen ad Inst. 4.11.4 nr.1) should be held against him.

5. Where the non-domiciled foreigner resides at a place where the court's order cannot be executed, the incola's application for a cautio fideiussoria will be granted more readily.

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In his note (g) to Voet 2.8.1 Van der Linden makes the following illuminating observations concerning applications by incolae for the furnishing by non-domiciled foreigners of security by sureties (fideiussores) viz.:

> "Such security is claimed every day. And it provides every day a handle for introductory questions, which are often canvassed to no purpose at the greatest expense to litigants because they have not yet been settled by express law. It is surely a thing to be desired that either security for costs should be wholly swept away from our tribunals, or at least that a plain and very complete rule should be laid down by the highest sovereign power for the purpose of shredding away the trifling queries which debtors are wont every day to raise in this matter to quite a sickening degree in order that they may put off payment."

Thus far the Legislature has not acted on Van der Linden's advice. In addition it may be pointed out that there was

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always a danger that non-domiciled foreigners could very easily swear that they could not find sureties, as Van Bynkershoek (1673-1743) indicated in 2 Observationes Tumultuariae 1904 : " - - - sic enim facile jurabunt peregrini, etiam locupletissimi." The only practical solution to prevent such possible abuse was apparently to ensure that the inquiry at all times was alive to such tendency on the part of non-domiciled foreigners.

I now turn to consider the South African practice. Domicile is no longer the sole criterion in determining whether or not a person is an incola subject to the jurisdiction of the court. Residence

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(other than temporary residence) may suffice as a criterion but for purposes of this case it is not necessary to determine the precise nature of such residence since it is not in dispute that the respondent is an *incola* subject to the jurisdiction of the Court *a quo*. It is also common cause that the appellant was an *incola* subject to the jurisdiction of the Court *a quo* when he instituted his action against the respondent but that he became a *peregrinus* on 4 December 1981. Normally an application for the furnishing of security for costs should be brought against a *peregrinus* before *litis contestatio* but it

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may be brought at any stage of the proceedings should the plaintiff have changed his status to become a peregrinus, as in the present case. Damhouder, op. cit., cap.99 nr.11:

> "Dewijle alle die cautie of satisdatie, volghende de practijcke, geeyscht moet werden ende ghestelt voor de litiscontestatie, de welcke soose onnoodigh is, soo is oock de cautie of satisdatie onnoodigh. Maar dat is te verstaan, als hy een Inlander geweest zijnde, nu een Uitlander ende vagabund geworden is : want in dat cas mach men oock cautie of satisdatie naer de litiscontestatie begeeren : want men mach caveren in allen deelen van den processe."

It is indeed surprising that HENNING J. in Drakensbergpers Bpk & Others v. Sharpe, 1963(4) SA 615 (N) could not find, nor was he apparently referred by counsel to, any direct authority on this point. In Schunke v. Taylor and Symonds, 8 SC 104 at p. 111 BUCHANAN J observed

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that the cautio juratoria was "a security upon which, in these days, I fear, very little value would be placed." His judgment was delivered in 1891. Later in Setecki v. Setecki, 1917 TPD 165 at p.169 MASON J found that the juratory oath (cautio juratoria) had fallen into desuetude. Nothwithstanding the obsolescence of the cautio juratoria as security on oath we must bear in mind that our common law principles which underlie its granting are still applicable in our modern practice when a peregrinus in his answering affidavit deposes to his inability to furnish security for costs owing to his impecuniosity, since it must be left to the judicial discretion of the court by having due regard to the particular circumstances

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of the case as well as considerations of equity and fairness to both the incola and the peregrinus to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs. Nor is there any justification for requiring the Court to exercise its discretion in favour of a peregrinus only sparingly. It follows that the following dictum in Saker & Co. Ltd. v. Grainger, 1937 AD 223 per DE WET J.A. at p. 227, viz.: "The principle underlying this practice is that in proceedings initiated by a peregrinus the Court is entitled to protect an incola to the fullest extent," should be read subject to the qualification that it is only applicable after the Court, in the exercise

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of its judicial discretion in accordance with the principles hereinbefore stated, had come to the conclusion that the peregrinus should not be absolved from furnishing security for costs.

It appears from the appellant's answering affidavit that he is, and has at all relevant times been, employed as a labourer in East London. He commenced his action against the respondent while he was both a citizen and an incola of the Republic of South Africa. Without his volition the South African Legislature in its omnipotence on 4 December 1981 caused him to cease to be an incola in the jurisdiction of the Court a quo and to become a peregrinus. In paragraph 7 of his answering

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affidavit he alluded to his impecuniosity in the following terms:

> "Because I did not have sufficient funds to sustain this litigation, I have been assisted to institute the civil claim against the Defendant by the Legal Aid Board which is a statutorily established Legal Aid Board established under the Legal Aid Act, No. 22 of 1969. The assistance given by the Legal Aid Board includes the prosecution of my claim to finality."

This must be read in conjunction with paragraph 10 of his answering affidavit which reads as follows:

> "I am, in any event, not in a position to furnish the security demanded and will be gravely prejudiced should this Honourable Court order that I furnish security <u>as this will effectively destroy my chances of prosecuting this action against the Defendant</u>."
>
> (My underlining).

/Scanty .....

Scanty as the information about his lack of financial means may be, his allegations concerning his impecuniosity do derive some support from the fact that he actually ob= tained legal aid to prosecute his claim against the respon= dent to finality as well as from the allegation that an order compelling him to furnish security would effectively destroy his chances of prosecuting his action against the respondent. The approach of the Court a quo on this aspect was as follows:

> "He submits in the first place that he is not in a position to furnish security and will be gravely prejudiced if he is ordered to do so. This, in my view is not a circumstance on which he can rely for the relief he seeks. To hold otherwise would be effectively to defeat the very object of the rule (Santam Insurance Co. Ltd v. Korste 1962(4) SA 53 (E) at p 56; Rapanos v. Rapanos N.O.

1958(2) SA 705 (T) at p 707)."

In my view this approach clearly constitutes a serious misdirection which amounts to an entire negation of the important principles of our common law underlying the cautio juratoria the object of which was to come to the relief of a peregrinus who in the exercise of the court's discretion, by having regard to all the relevant facts as well as considerations of equity and fairness to both parties, should be absolved from furnishing security by means of sureties (fideiussores). The Roman-Dutch authorities referred to supra emphasise that no one should be compelled to furnish security beyond his means and that a peregrinus should not on account of his impecuniosity be deprived from prosecuting his action against an incola.

/The .....

The Court a quo also misdirected itself in considering the fact that the appellant was, and still is, employed in East London "to be entirely irrelevant to the issue". It is certainly relevant to the issue that the appellant is economically active within the jurisdiction of the Court a quo where he is earning his livelihood. This is moreover an indication that he is not a vagabundus or a suspectus de fuga. It rather tends to suggest that he is an honourable man and not a dishonourable person.

Another misdirection by the Court a quo

/is .....

is that it failed to consider the fact that execution of its judgment is possible where the appellant resides in the Republic of the Ciskei. Counsel for the respondent correctly conceded during argument in this Court that a judgment of a South African court could be enforced in the Ciskei.

On a consideration of all the relevant facts, bearing in mind the misdirections by the Court a quo and having regard to the applicable principles of our common law which underlie the cautio juratoria as well as considerations of equity and fairness to the parties, I am of the view that the Court a quo was wrong in not absolving the appellant from furnishing security for costs to the respondent.

/The .....

The application should have been dismissed with costs.

C.P. JOUBERT JA

JANSEN JA

VILJOEN JA

BOSHOFF JA

NESTADT AJA