



REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 556/07

In the matter between:

DIETER SCHMIDT

APPELLANT

and

BIRGITTA WEAVING

RESPONDENT

Neutral citation: This judgment may be referred to as *Dieter Schmidt v Birgitta Weaving* (556/07) [2008] ZASCA 123 (29 September 2008)

CORAM: SCOTT, FARLAM, JAFTA, MLAMBO et MAYA JJA

HEARD: 11 SEPTEMBER 2008

DELIVERED: 29 SEPTEMBER 2008

SUMMARY: Attachment of member's interest in close corporation to confirm jurisdiction – whether notice to corporation required – whether s 25 of Close Corporations Act 69 of 1984 applicable.

ORDER

On appeal from: High Court, Cape Town (Desai J sitting as court of first instance).

1. The appeal succeeds with costs, including where they were employed those of two counsel.
2. The order of the court *a quo* is set aside and replaced by the following:
The special plea is upheld with costs, including those occasioned by the employment of two counsel.

JUDGMENT

FARLAM JA (SCOTT, JAFTA, MLAMBO AND MAYA JJA concurring)

[1] This is an appeal from a judgment of Desai J, sitting in the Cape High Court, in which the appellant's special plea contesting the jurisdiction of the high court in an action instituted against the appellant by the respondent was dismissed.

[2] In the particulars of her claim which were annexed to her summons the respondent gave the appellant's address as 'c/o Jan S de Villiers, Zomerlust Estate, Berg River Boulevard, Paarl', that is to say, the Paarl address of his attorneys of record. Approximately sixteen months after the summons was issued the respondent brought an *ex parte* application for an order authorising the sheriffs of the court or their deputies to attach *ad fundandam* alternatively *ad confirmandam jurisdictionem* the appellant's 'right, title, interest and/or claims' to certain of the appellant's assets for the action which she had instituted against the appellant. The assets to be attached were his member's interests in three close corporations, viz Le Cap International CC, TJ Walker

CC and Cape Skin Clinic CC. In her supporting affidavit in the application the respondent stated that the appellant resides permanently in the United States of America and is a *peregrinus* of the court's area of jurisdiction. The relief sought in the application included a prayer for leave to serve the summons which had already been issued.

[3] The application was granted by Foxcroft J. Thereafter attempts were made by the deputy sheriff of Simonstown (in respect of the member's interest in Cape Skin Clinic CC), the sheriff for Cape Town (in respect of the member's interest in TJ Walker CC) and the sheriff for Wynberg North (in respect of the member's interest in Le Cap International CC) to attach the assets set forth in the court's order at the registered offices of the close corporations concerned.

[4] Approximately a month after these attempts were made, various documents, including the summons in this matter, were served on the appellant in the United States of America.

[5] The appellant filed a special plea to the jurisdiction of the court together with a conditional special plea to one of the claims contained in the respondent's summons and a plea on the merits.

[6] In his special plea to the jurisdiction the appellant averred that he resided permanently in the United States of America and is a *peregrinus* of the court's area of jurisdiction. He alleged further that the respondent was prosecuting the action against him on the basis that his member's interests in the three close corporations to which I have referred had been attached to found or confirm the court's jurisdiction. He denied that any effective attachment to found or confirm jurisdiction over him had taken place. Among the bases on which he denied that there had been valid attachments of his member's interests were the following:

- (a) Rule 45(8) of the Uniform Rules had not been complied with;
- (b) the attachments purportedly carried out were not effected in conformity

with the requirements of the law; and

- (c) none of the purported attachments was effected under authority of a writ of attachment.

[7] The issues raised by the special plea of jurisdiction were heard separately pursuant to an order made by the Judge President of the High Court in terms of Rule 33(4) of the High Court Rules. No evidence was led but various documents were handed in from the bar.

[8] In his judgment dismissing the special plea, the learned judge in the court *a quo* rejected a submission advanced by the respondent's counsel, relying on *Anderson & Coltman Ltd v Universal Trading Company* 1948 (1) SA 1277(W), that the appellant had adopted the wrong procedure. What he should have done, so counsel had argued, was not to file a plea to the jurisdiction but apply to set aside the order made by Foxcroft J. Desai J held that the procedure adopted by the appellant was 'at least permissible, if not desirable for the reasons advanced by [the appellant's] counsel.' He held that Rule 45, which deals with execution, does not apply to attachments to found or confirm jurisdiction. He distinguished the case of *Badenhorst v Balju, Pretoria Sentraal* 1998 (4) SA 132 (T), on which the appellant's counsel who appeared before him had relied, because, so he held, it was decided with reference to the specific requirements of Rule 45(8). He held that the giving of notice to the Registrar of Close Corporations was the equivalent of requesting a caveat to be noted in the records of the Registrar of Deeds. He also held that the fact that the purported attachments were not effected under writs of attachment was a defect of a rather technical nature which he was at liberty to condone.

[9] Dealing with an attack on the effectiveness of the attachment, he held that an attachment to found or confirm jurisdiction 'does not provide an asset in respect of which execution can be levied. It may have little or no value by the time of execution. Furthermore, effectiveness is no longer a necessary "criterion for the existence of jurisdiction."' (See: *Tsung v Industrial*

Development Corporation of SA Ltd 2006 (4) SA 177 at 181).

[10] When the case was argued before us Mr *Hodes*, who appeared with Ms *Dicker* on behalf of the respondent, indicated that in supporting the judgment in the court *a quo* he was only relying on the purported attachment of the appellant's member's interest in Le Cap International CC at its registered office, 8 Hampton Avenue, Newlands. In the circumstances I shall only summarise the evidence in so far as it relates to what happened at that address.

[11] In a document headed 'Notice of Attachment and Inventory to Confirm Jurisdiction' a deputy sheriff for Wynberg North stated that he attached the appellant's 'right, title, interest, claim and demand in and to his 33 per cent membership interest in Le Cap International CC', the approximate value of which he stated to be R1 000. In another document headed 'TAX Invoice – Order of Court to Confirm Jurisdiction' which is signed by N L Botes, deputy sheriff for Wynberg North, and which I shall assume is to be treated as a deputy sheriff's return, the following appears:

'I certify that on 17 – May – 2005 at 11:00 at 8 HAMPTON AVENUE, NEWLANDS, I handled the abovenamed process in the manner indicated below:

MANNER OF SERVICE/EXECUTION:

By proper service of a copy of the ORDER OF COURT TO CONFIRM JURISDICTION & NOTICE OF ATTACHMENT AND INVENTORY upon the respondent [who is described earlier in the document as the present appellant] by affixing a copy thereof to the main door of the registered office of Le Cap International CC at the above address.

PLEASE NOTE FURTHER THAT THE PRESENT OCCUPIER, MS FLEISCHER STATES THAT THE RESPONDENT AND LE CAP INTERNATIONAL CC ARE UNKNOWN TO HER.'

[12] On 18 May 2005 a letter was written on behalf of the sheriff for Wynberg North to the Registrar of Close Corporations informing him that the appellant's interest in the close corporation *had* been placed under attachment and stating that

'the aforementioned member's interest may not be transferred while under attachment. This office', the letter continued, 'will notify you in writing as soon as this attachment has been uplifted. It will be appreciated if you could supply us with a copy of the CK1 form [ie, the Founding Statement] for the abovementioned close corporation.'

[13] In a further document emanating from the office of the sheriff for Wynberg North, and signed by Deputy Sheriff A van der Vyver, it is stated that a warrant of execution against movable property in this matter was handled as follows:

'By proper service of a copy of the ORDER OF COURT TO CONFIRM JURISDICTION & NOTICE OF ATTACHMENT AND INVENTORY upon the REGISTRAR OF CLOSE CORPORATIONS, PO BOX 429, PRETORIA, 001, by prepaid registered post.'

[14] On 13 June 2005 a copy of the CK1 form relating to the close corporation was certified to be a true copy by a senior administration clerk in the employ of the Registrar of Close Corporations. It was presumably sent to the Sheriff for Wynberg North in response to the request contained in his letter of 18 May 2005 but it is not clear when he received it.

[15] Mr *Rogers*, who appeared on behalf of the appellant, attacked the purported attachment of the appellant's membership interest in Le Cap International CC on several grounds, of which it is only necessary for me to mention one, namely that in the absence of proof that the purported attachment of the appellant's membership interest had been brought to the notice of the close corporation it was invalid. In support of this submission he referred to what was said by Innes CJ, when giving the judgment of the Transvaal Supreme Court in *Reinhardt v Ricker and David* 1905 TS 179. That case was concerned with the attachment of an incorporeal, in that case a mortgage bond, of which Reinhardt was the holder, to found jurisdiction. The original bond was in Germany and a copy was attached and subsequently sold in execution of a judgment against the bondholder by default. The copy

was ceded to the purchasers by the deputy sheriff and the cession was registered. After the default judgment had been set aside the court held that the sale in execution was invalidated by the absence of the original bond and its non-attachment and that no title had been conferred on the purchasers. In a passage in the judgment from pages 185 to 187 Innes CJ discussed how incorporeals such as debts were attached in the old Dutch practice and in the Cape and thereafter in the Transvaal. At p 187 he said this:

‘[T]he essential to be observed in all cases of the attachment of debts is that the debtor should receive due notice, so that he may be warned not to discharge his obligation to his original creditor, and so that he may have an opportunity of coming to the Court for relief in case he wishes to raise the question of the validity of the debt, or any lien, discharge or other matter which would operate in his favour.’

[16] Mr *Rogers* submitted further that as a member’s interest (like a share in a company) is a bundle of incorporeal rights against the close corporation, the close corporation can be likened to a defendant’s debtor in the case of an ordinary debt. Thus for an effective jurisdictional attachment there has to be actual notice to the corporation because the debtor must know that he or she may not pay the debt to the defendant. Absent such knowledge, the position after the purported attachment would be the same as it was before the purported attachment and the relations between the debtor and the defendant would be unaffected.

[17] Mr *Rogers* contended that the notice which was given to the Registrar of Close Corporations took the case no further. Apart from the fact that the Registrar was told, incorrectly, that the appellant’s member’s interest *had* been attached, there was nothing that the Registrar could have done about the matter and Desai J’s finding that the notice given to him was equivalent to requesting a caveat to be noted in the records of the Registrar of Deeds was incorrect. This was because the transfer of a member’s interest in a close corporation – unlike the transfer of immovable property – requires no participation by the Registrar.

[18] Mr *Hodes* endeavoured to answer Mr *Rogers*'s submissions on this part of the case by arguing that notice to the corporation was not required for an effective jurisdictional attachment of a member's interest because the equivalent of a caveat against transfer of the interest had been sought from the Registrar and, alternatively, that there was in any event notice because of the fact that a copy of Foxcroft J's order was affixed to the main door of the registered office of the corporation: in this regard he relied on s 25 of the Close Corporations Act 69 of 1984.

[19] His first argument cannot be accepted. No reason was advanced for rejecting the *dictum* of Innes CJ on which Mr *Rogers* relied, which is in accord with both principle and practicality. Moreover Mr *Rogers* was clearly correct when he submitted that a request for a caveat would not preclude the transfer of the interest. See s 15(1) of the Act which provides for an amended founding statement to be lodged where there is a change of membership within 28 days *after* such change.

[20] The second argument can, in my view, also not be accepted. Section 25 of Act 69 of 1984 reads as follows:

'(1) Every corporation shall have in the Republic a postal address and an office to which, subject to subsection (2), all communications and notices to the corporation may be addressed.

(2) Any—

- (a) notice, order communication or other document which is in terms of this Act required or permitted to be served upon any corporation or member thereof, shall be deemed to have been served if it has been delivered at the registered office, or has been sent by certified or registered post to the registered office or postal address, of the corporation; and
- (b) process which is required to be served upon any corporation or member thereof shall, subject to applicable provisions in respect of such service in any law, be served by so delivering or sending it.'

[21] In my opinion the section takes the case no further. We are not concerned here with a document which the Act requires or permits to be served on a corporation nor with the service of process. For the reasons underlying the requirement of notice in cases of this kind it is important that *actual* notice be given and that the fact that the bundle of rights vesting in the member has been attached must be known to the corporation.

[22] It follows that the purported attachment of the appellant's member's interest in Le Cap International CC was invalid on this ground alone. This conclusion renders it unnecessary to consider whether the attachment was also invalid because the appellant's certificate of his member's interest issued in terms of s 31 of the Act was not attached or whether the decision in *Badenhorst v Balju, Pretoria Sentraal, supra*, can be distinguished and whether certain of the *dicta* therein (especially at 138J-F) are correct. It is also unnecessary in the circumstances to decide whether the purported attachment was invalid because there was no writ of attachment.

[23] In my view a valid attachment was required in this case for the court to have jurisdiction. It is true that to some extent the principle of effectiveness has been eroded (*Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries* 1969 (2) SA 295(A) at 300G-H) but as was pointed out in that case (at 309E-F and see further *Bid Industrial Holdings (Pty) Ltd v Strong* 2008 (3) SA 355 (SCA) at 363 F-H) jurisdiction will not be founded or confirmed if an article without some saleable value is attached: *a fortiori* if no valid attachment takes place at all.

[24] In the circumstances I am satisfied that the appeal must succeed.

[25] The following order is made:

1. The appeal succeeds with costs, including where they were employed those of two counsel.

2. The order of the court *a quo* is set aside and replaced by the following:
'The special plea is upheld with costs, including those occasioned by the employment of two counsel.'

.....
IG FARLAM
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT: O L Rogers SC

Instructed by
Jan S de Villiers, Paarl
Hill, McHardy & Herbst Inc, Bloemfontein

FOR RESPONDENT: P B Hodes SC
T A Dicker

Instructed by
Cliffe Dekker Inc, Cape Town
Claude Reid, Bloemfontein