CASE NO.: A 456/97

BOURGWELLS LTD (OWNER OF THE MFV "OFELIA") versus VLADIMIR I SHEPOVALOV AND 43 OTHERS

HANNAH, J.

1998/03/09

ADMIRALITY

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By the mere arrest of a vessel the Deputy-Sheriff gains custody and not possession. - The vessel's owner is entitled to put a replacement/repair crew on board.

CIVIL PROCEDURE

Attachment ***ad confirmandam jurisdictionem***

Where an attachment has taken place, there is no basis for denying a plaintiff, whether ***incola*** or peregrinus, any benefit conferred thereby merely because the other party ***ex post facto*** and unilaterally submits to the jurisdiction of the court.

Attachment of a right to a judgment is an attachment of an incorporeal right. Such right exists in the locality where the debtor resides.

CASE NO. A 456/97

IN THE HIGH COURT OF NAMIBIA

In the matter between

BOURGWELLS LTD (OWNERS OF THE MFV "OFELIA") **APPLICANT**

and

VLADIMIR I SHEPOVALOV AND 43 **OTHERS** **RESPONDENT**

CORAM: HANNAH, J.

Heard on: 02/02/1998

Delivered on: 09/03/1998

JUDGMENT:

HANNAH, J.: On 28th November, 1997 the applicant was granted an *ex parte* rule *nisi* calling upon the respondents to show cause on 6th February, 1998 why an order should not be made:

" 1. Authorising and directing the Deputy-Sheriff of this Court to attach all the Respondents' right, title and interest in and to the judgment amount and costs order awarded to the Respondents in case number AC 3/97 in the High Court of Namibia *confirmandam jurisdictionem* in respect

of an action to be instituted by the applicant against the Respondents.

2. Ordering that the costs of this application be costs in the action to be instituted in terms hereof save in the event of this application being opposed ordering Respondents to pay the costs of this application."

The first part of this order was given interim effect pending the return date.

On 21st January, 1998 the respondents anticipated the return day. The matter was set down for hearing at 10am on 22nd January, 1998 but on the application of the applicant it was postponed to 2nd February on which day it was argued before me.

The background to the applicant's application is as follows. The applicant company is registered in the United Kingdom and it claims to be the owner of a fishing vessel named Ofelia. The respondents were part of MFV Ofelia's crew. MFV Ofelia has been under arrest at Walvis Bay by various creditors since 10th December, 1996. Following the arrest of the vessel its crew remained on board and there is a dispute between the parties as to the circumstances in which they remained on board. The applicant alleges that their occupation of the vessel was unlawful whereas the respondents allege that the applicant insisted that they remain on board. I will return to this issue later. What is not in issue, however, is that the respondents were not paid their wages and the respondents sued, having first arrested the vessel to found or confirm jurisdiction. On 2nd May, 1997 they obtained default judgement in the amounts of US$131,380-00 and N$275,440-00 with interest thereon and costs. The

former amount was in respect of outstanding wages whereas the latter amount represented the cost of repatriating the respondents to Bulgaria, their home country. Subsequently, there was partial compliance with the judgment in that US$34,800-00 was paid to the respondents' attorneys and a number of air tickets were provided. Eventually, twenty nine of the respondents were repatriated to Bulgaria. The applicant avers that this was on 12th August whereas the respondents rver that it was on 31st July. There is also a dispute as to the number of respondents who remained aboard the vessel. The applicant avers seven whereas the respondents aver six. The respondents then caused a warrant of execution to be issued though it is not clear on the papers when this was done. On 7th November, 1997 notice of sale in execution of the vessel was published and the date of the sale was given as 3rd December. On 2nd December the applicant's attorneys tendered a cheque to the Deputy-Sheriff for N$563,230,47 in satisfaction of the writ of execution and by separate letter of the same date referred the Deputy-Sheriff to the order made on 28th November attaching the respondents' right, title and interest in and to the judgment amount. They pointed out that the Deputy-Sheriff was accordingly precluded from paying out the monies paid to him pending the return day of the rule. It was in these circumstances that the respondents anticipated the return day.

An applicant seeking an order of attachment *ad fundandam or confirmandam jurisdictionem* must show -

1) That it has a prima facie cause of action against the proposed defendant;

2) That the proposed defendant is a *peregrinus;*

3) That the proposed defendant is within the area of jurisdiction of the Court or that property in which the proposed defendant has a beneficial interest is within that area.

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As for the first requirement, the correct approach when deciding whether a prima facie cause of action has been shown is set out in the following passage in the judgment of Steyn J. in *Bradbury Gretorex Co. Ltd. v Standard Trading Co. Ltd.* 1953 (3) S.A. 529 (W) at 533 D, a passage cited with approval by this Court in *J. Da Silvd Augusto v Sociedade Angolana De Commercio International Limitada (Salcilda)* (High Court Case A 285/96) (Unreported) -

> "The authorities and considerations to which I have referred seem to justify the conclusion that the requirement of a prima facie cause of action, in relation to an attachment to found jurisdiction, is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged on the ground here in question".

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With this passage in mind I now turn to the allegations made in the applicant's founding affidavit. It is alleged, and this allegation is, of course, central to the whole

application, that the applicant is the owner of MFV Ofelia. This allegation is disputed by the respondents in their answering affidavit where it is alleged that certain papers or documents found on board the vessel and certain other evidence indicates that the vessel is not owned by the applicant but by a subsidiary. In its replying affidavit the applicant joins issue on this question and asserts once again that it is the owner and certain documents are annexed in support of this assertion. I do not propose to set out details of the allegations and counter-allegations. Suffice it to say that although there is confusion in the evidence as to the ownership of MFV Ofelia, and this much is conceded by Mr Frank, who appeared for the applicant, it certainly cannot be said that it is quite clear that it is not the owner; and, following the approach laid down in the *Bradbury Gretorex* case (supra) the issue of ownership must, for the purposes of the present application, be resolved in favour of the applicant.

It is further alleged that the respondents, and there are forty four of them, unlawfully seized MFV Ofelia and thereafter refused to allow the applicant to place a repair crew and a replacement crew on the vessel. It is further alleged that the respondents damaged the vessel. It is alleged that as a result of the foregoing the applicant has a claim or claims against the respondents in excess of US$140,000-00.

The way the applicant puts its claim based on the respondents' alleged refusal to allow the applicant to place a repair crew and a replacement crew on board is as follows. Subsequent to the repatriation of the bulk of the crew the applicant arranged for nine replacement crew members to go on board and initiate repairs. However, the respondents denied the replacement crew access and therefore prevented the applicant

from having its vessel repaired and brought up to a state of seaworthiness. Then, in September, 1997, the respondents similarly prevented a repair crew of seven engineers who arrived from Bulgaria from boarding the vessel. The cost of transporting, accommodating and remunerating both crews is alleged to be US$83,805-53. The cost of making the vessel seaworthy is estimated as US$20,000-00.

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In addition to the foregoing, the applicant alleges that the respondents removed property valued at U$50,000 from the vessel and that they have also caused damage which will cost in excess of US$20,000 to repair.

The applicant seeks to overcome the difficulty presented by the fact that only six of the respondents remained on board after 12th August, 1997 (according to the respondents, 31st July, 1997) by alleging that the respondents acted in concert and with a common purpose to compel the applicant to pay their wages and that they are jointly and severally liable for the damage caused to the applicant. The applicant relies on a letter from the respondents' attorneys dated 28th October, 1997 in which it is stated, *inter alia:*

> "1. Our clients shall remain on board of the "OFELIA" until such time as their claims have been settled alternatively the vessel has been sold.
>
> 2. Our clients demand payment of at least US$21,000,00 in part payment of the crew claims and which amount is calculated based on the 6 crew members (on board of the vessel) salaries up to 7th April 1997.

3. The balance of our clients' claim needs to be paid alternatively payment is to be guaranteed by way of a bank guarantee within 21 (twenty one) days from the date hereof."

The applicant also relies on a letter dated 25th August, 1997 in which the respondents' attorneys state, *inter alia* - . *

"1. Our clients shall remain in possession and on board the MFV "Ofelia" until all crew claims have been paid in full."

I will return later in this judgment to the question whether it can properly be inferred that the respondents acted in concert and with a common purpose.

One matter raised in the answering affidavit is whether the applicant was entitled to put a replacement crew and a repair crew on board the vessel at all in view of the fact that at all material times the vessel was under arrest at the instance of the respondents or other creditors. I will deal with this matter briefly. If the South African Admiralty Proceedings Rules applied in this country there might be some substance in the point. Rule 19(1) provides that any property arrested shall be kept in the custody of the sheriff or his deputy -

"who may take all such steps as the Court may order or as appear to him to be appropriate for the custody and preservation of the property ..."

And in *The MV Avalon: Cumow Shipping Ltd* v *Brooks N O and Another* 1996 (4) S.A. 989 (D) Thirion J., after having considered various authorities, concluded -

> "It would appear to me from what has been said on the subject of arrest that it is the duty of the sheriff, after he has arrested a vessel, to keep it in safe custody and to take all reasonable steps necessary for the preservation of the vessel so as to prevent a deterioration in its condition".

If such is the duty of the sheriff or his deputy then it is arguable that the owner's rights to maintain the vessel are ousted.

However, the Admiralty Proceedings Rules of South Africa do not apply in Namibia. The Rules for the Vice-Admiralty Courts in Her Majesty's Possessions Abroad, 1883, strange as it may seem, still apply and those Rules contain no provision similar to that contained in Rule 19(1). Indeed, the Rules are silent on the matter in question. They do, however, make provision in Rule 207 for cases not provided for in the Rules. Rule 207 provides:

> "In all cases not provided for by these Rules the practice of the Admiralty Division of the High Court of Justice of England shall be followed."

Turning, therefore, to that part of *Halsbury's Laws of England* (4th ed.) Vol 1 (1) which is headed "Practice of the High Court" one finds at para. 378 the following -

> "By the mere arrest of a ship the marshal gains custody and not possession; subject to his control of the custody all possessory rights which previously existed continue to exist, including all the remedies which are based on possession."

It must follow, in my view, that the applicant was entitled to put a replacement crew and a repair crew on board its vessel and prima facie it has an action against the respondents if, as alleged, they prevented it from doing so and if as a result the applicant suffered the alleged loss.

With regard to the claim for items allegedly removed by the respondents from the vessel the position of the applicant is rather different. All the deponent to the founding affidavit can state is -

> "I can however state that as far as Applicant knows, at least the following items have been removed ..."

There then follows a list of items. Can this bald assertion, vague as it is, be classified as evidence? In my view not. I do not consider that the requirement of a prima facie cause of action has been made out in the case of the goods allegedly removed.

I now return to the question whether the applicant has shown that it has a prima facie cause of action against all the respondents. Mr Frank was constrained to concede that as a matter of complete impracticality the judgment, the rights to which have been

attached, cannot be divided. It was one judgment granted in favour of all the respondents. The applicant must therefore show a prima facie cause of action against each and every respondent if the rule is to be confirmed. And it is in this regard that the applicant faces considerable difficulty. It can be inferred from the facts deposed to in the founding affidavit that the six respondents who remained aboard when the rest were repatriated may have been deputed to remain aboard so as to ensure that the vessel would not surrepticiously slip anchor in the event of a replacement crew being put abroad; but that is not enough. Can it also be properly inferred that the crew which left authorised or deputed that which remained to go further and prevent the applicant's replacement crew and repair crew from having any access at all? Indeed, was it even in their contemplation that the applicant would seek to put a new crew on board prior to their judgment being satisfied? As Lord Wright observed in *Caswell v Powell Duffryn Associated Collieries Ltd.* 1939 (3) All E.R. 722 at p. 733:

> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish ... But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

In my view, there are no positive facts averred in the founding affidavit from which the inference can be made that those respondents who were repatriated acted in concert with those respondents who remained and with a common purpose when the remaining respondents acted to prevent the replacement crew and the repair crew from boarding

MFV Ofelia. It follows from this, coupled with Mr Frank's concession, that the rule must be discharged.

In an alternative submission Mr Frank submitted that the attachment should nonetheless be permitted to stand as a form of security to prevent the respondents from disposing of the fruits of their judgment or removing them from the jurisdiction thus leaving the applicant with an empty judgment should it ultimately succeed in its action. The short answer to this submission has just been given. The applicant has not made out a prima facie cause of action against the bulk of the respondents. Why, in these circumstances, should they, the bulk, be deprived of the fruits of the judgment which they have obtained against the applicant pending determination of an action to be instituted by the applicant when the applicant has not been able even to show a prima facie cause of action on its own papers? The answer, in my opinion, is that they should not.

Mr Heathcote, for the respondents, made certain other submissions as to why the rule *nisi* should be discharged and I will deal with these, albeit briefly. The rule nisi and attachment order was issued on 28th November, 1997 and a copy of the order was served on the respondents' attorneys on 1st December. There was then some delay while those attorneys took instructions from their clients and by letter dated 16th January, 1998 the respondents' attorneys informed those acting for the applicant that the respondents consented to the jurisdiction of this Court. That letter was delivered on 20th January. Mr Heathcote submitted that by virtue of this consent the respondents are entitled to have the rule and attachment order discharged. He relied

in particular on the judgment in *Utah International Inc* v *Honeth and Others* 1987 (4) S.A. 145 (W).

In the *Utah* case the Court, at the instance of the respondents, had granted *ex parte* an order for the attachment *ad confirmandam jurisdictionem* of certain assets of the applicant, a *peregrinus* of the Court. The applicant became aware of the order on the same day as it had been granted and immediately consented to the jurisdiction of the Court. On the following day writs of attachments were issued and certain attachments were made. The applicant successfully applied to have the writs of attachment set aside. The Court set the writs of attachment aside on the basis that the consent to jurisdiction had been given within a reasonable time after the order for attachment had been communicated to the *peregrinus,* that an attachment was no longer required in order to secure jurisdiction and that the respondents should not be permitted to execute an order to achieve an object which had nothing to do with jurisdiction.

This decision is in contrast to a long line of authority in the South African courts to the effect that consent to jurisdiction by a *peregrinus* after an order of attachment has been executed is too late. It may be that the fact that it was common cause that the writs of attachments were in any event invalid influenced the decision. However, whether that be the case or not I am satisfied that the high-water mark was properly set by Goldstone J. in *Elscint (Pty) Ltd and Another v Mobile Medical Scanners (Pty) Ltd* 1986 (4) S.A. 552 (W) when he said at p. 557 E -

"Where an attachment has taken place, there is no basis for denying the *incola*

(plaintiff) any benefit conferred thereby merely because the *peregrinus, ex post facto* and unilaterally submits to the jurisdiction of the Court."

In my view, this *dictum* is equally applicable to an attachment at the instance of a *peregrinus* plaintiff. I respectfully agree with Farlam AJ when he said in *Blue Continent Products (Pty) Ltd* v *Foraya Banki PF* 1993 (4) S.A. 563 at p. 574 D that there is no basis -

"....for departing from the clear line of authority to which I have referred and which established that an *incola* plaintiff is entitled to have a *peregrine* defendant or his property arrested for two purposes: (1) to found or confirm jurisdiction; and (2) to secure the debt, to some extent at least. Once an *incola* plaintiff has achieved both purposes and obtained, *inter alia,* the benefit of security, in part at least, for his claim, it would not be appropriate to deprive him thereof merely because the other purpose, viz of founding or confirming jurisdiction, can now be achieved in another way by means of the defendant's submission. There is another reason for coming to this conclusion. If a defendant only submits to the court's jurisdiction once his goods have been attached, there is a danger that a judgment thereafter given against him may not be recognised internationally because he may be able to contend in some other forum that his submission was not voluntary because it only took place after the arrest: ref *Voinet* v *Barrett* (1885) 55 L.J. Q B 39 CA at 41 and *Guiard* v *De Clermont* [1914] 3 KB 145."

Farlam AJ refers in this passage to an *incola* plaintiff but I can see no reason in principle why the learned judge's observations should not also apply to a *peregrinus* plaintiff. Accordingly, I am of the view that Mr Heathcote's submission based on *ex post facto* and unilateral submission to the jurisdiction of the Court must fail.

Another submission made by Mr Heathcote concerns the *situs* of the right which was attached. The attachment was of the respondents' right, title and interest in and to the judgment amount and costs order. It was, therefore, an attachment of an incorporeal right. To use the words of Hoexter J.A. in *Nahrungsmittel Gmbtt* v *Otto* 1993 (1) SA 639 (A) at p. 647 F:

> "One is concerned here with intangible property rights which can have no physical locality".

And as was pointed out by Foxcroft J in *The MV Snow Delta: Discount Tonnage Ltd v Serva Ship Ltd* 1997 (2) S.A. 719 (CPD) at p. 722 F: **j**

> "A right can obviously have no physical locality. A right is attached to a person who exercises that right. A right cannot exist in some place separately from the person who exercises that right."

Returning to the judgment of Hoexter J.A. in the *Nahrungsmittel* case, the learned judge cited the following passage from the judgment of Innes C.J. in *Randfontein Estates Gold Mining Co Ltd v Custodian of Enemy Property* 1923 AD 576 -

> 'There is no need however to consider the application to them of the doctrine *mobilia personam sequuntur,* nor to discuss the statement of *Grotius* that *actiones personales* are governed by the law of the debtor's domicile. Because the point to be determined is not what system of law governs the disposition or devolution of such rights, but *where they are legally situated.* Now the only attribute of locality which they possess must relate to the locality *where the debtor resides.* It is there that performance is due, and it is there that the debtor must be sued if performance is to be exacted. It is only there that such incorporeal property can be regarded as localised.'

That, in my view, covers the situation in the present case. And, as Hoexter JA pointed out, the case of *Longman Distillers Ltd* v *Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) S.A. 906 (A), a case not dissimilar to the present one, provides a precise illustration of the principle being considered. Drop Inn was an *incola* of the area of jurisdiction of the Cape Provincial Division. Longman was a *peregrinus.* Longman had an order for costs against Drop Inn. Drop Inn had a claim against Longman and attached Longman's right, title and interest in and to the order for costs. That it was entitled to do because Drop Inn, the debtor, was an incola of the Court and the *situs* of the incorporeal which was attached was Cape Town. In the instant case the situs of the incorporeal which was attached was London where the applicant is registered, certainly not Namibia. It follows that Mr Heathcote's submission must succeed.

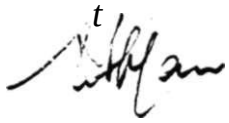
One further submission made by Mr Heathcote was that the facts did not justify the

application being brought on an ex *parte* basis and that the application was deliberately brought without notice in order to avoid the possibility of the respondents consenting to jurisdiction. In my opinion, there is also merit in this submission. While I agree with Mr Frank that applications for attachment are normally brought *ex parte* that is because normally there is a need for such applications to be brought *ex parte.* There was, however, no need for the present application to have been brought *ex parte.* The respondents' attorneys had asked the applicant's attorneys to give notice to them of any application or action which might be brought and it is reasonable to assume that had notice been given the attorneys would have agreed to accept service of any application. The property sought to be attached was an incorporeal right and there was no question of that right being removed from the jurisdiction, assuming that it existed within the jurisdiction, and there was no threat of the respondents disposing of their interest in or right to the judgment and costs order. It seems clear to me that the application was brought *ex parte* as part of a carefully planned stratagem. Step one was to obtain the interim attachment order. Step two was to satisfy the judgment debt by paying monies which would automatically become frozen. And step three was to set aside the sale of the MFV Ofelia. Had this stratagem been disclosed to the Court it may well be that the Court would not have made the *ex parte* order.

There remains to be considered the question of costs. Both counsel were agreed that costs should follow the event save with regard to the costs of 22nd January, 1997 which costs were reserved. 22nd January was the day on which the respondents anticipated the return day having served and filed their answering affidavit the previous day but the hearing was postponed on the application of the applicant to

enable it to file a replying affidavit and because its counsel indicated that he had had insufficient time properly to prepare. The respondents were, of course, entitled to anticipate on twenty four hours notice because of the procedure adopted by the applicant, a procedure which I have found was wrongly adopted. In these circumstances I see no reason why the applicant should not pay the wasted costs of 22nd January.

For the foregoing reason the rule nisi and the interim attachment order are discharged and the applicant is ordered to pay the costs of the application including the costs of 22nd January, 1998.



HANNAH, J.